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1-1-2003

## It Is Not So Simply because an Expert Says It Is So: The Reliability of Gang Expert Testimony Regarding Membership in Criminal Street Gangs: Pushing the Limits of Texas Rule of Evidence 702.

Placido G. Gomez

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### Recommended Citation

Placido G. Gomez, *It Is Not So Simply because an Expert Says It Is So: The Reliability of Gang Expert Testimony Regarding Membership in Criminal Street Gangs: Pushing the Limits of Texas Rule of Evidence 702.*, 34 ST. MARY'S L.J. (2003).

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# ST. MARY'S LAW JOURNAL

VOLUME 34

2003

NUMBER 3

## ARTICLES

### **IT IS NOT SO SIMPLY BECAUSE AN EXPERT SAYS IT IS SO: THE RELIABILITY OF GANG EXPERT TESTIMONY REGARDING MEMBERSHIP IN CRIMINAL STREET GANGS: PUSHING THE LIMITS OF TEXAS RULE OF EVIDENCE 702**

**PLÁCIDO G. GÓMEZ\***

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“[I]t is not so simply because ‘an expert says it is so.’”<sup>1</sup>

“If . . . an expert who was well qualified as an astronomer offered to testify based on lengthy and careful observation that the sun revolves around the earth, a court would not be obliged to submit the testimony to the jury.”<sup>2</sup>

The recent focus on crime and crime control has encouraged the criminal justice system to consider nontraditional models to address the activities of criminal street gangs. Today’s most fashionable weapon is the civil gang injunction. While hailed as an effective crime control measure by proponents,<sup>3</sup> injunctions have raised

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1. Merrell Dow Pharm., Inc. v. Havner, 953 S.W.2d 706, 712 (Tex. 1997).  
 2. Target Mkt. Publ'g, Inc. v. Advo, Inc., 136 F.3d 1139, 1143 (7th Cir. 1998).  
 3. See Stacie Orsagh-Aguillon, *East Side Crime Heading Downward; Statistics Show Aggressive Work Reducing Incidents*, SAN ANTONIO EXPRESS-NEWS, Apr. 3, 2002, at 1H, 2002 WL 17513177. The article attributes the decline in local drug trafficking to the implementation of four civil gang injunctions in San Antonio’s East side. *Id.*; see also Lawrence Rosenthal, *Gang Loitering and Race*, 91 J. CRIM. L. & CRIMINOLOGY 99, 100 n.5 (2000) (raising the issue of gang injunctions as they apply to issues of racial fairness); Gregory S. Walston, *Taking the Constitution at Its Word: A Defense of the Use of Anti-Gang Injunc-*

Constitutional concerns.<sup>4</sup> This Article begins with a brief history of criminal street gangs and the traditional responses of the criminal justice system. Then, after a cursory review of the history of gang injunctions and the important procedural aspects of their use, the focus of the Article will narrow to one aspect raised by the injunctions—the reliability of gang expert testimony regarding membership in criminal street gangs.

## I. THE HISTORY OF CRIMINAL STREET GANGS

Contemporary youth street gangs have a complex, intriguing history.<sup>5</sup> In the 1920s, street gangs were apparent in urban areas

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tions, 54 U. MIAMI L. REV. 47, 48 (1999) (describing the gang injunction as the most effective new technique used by the police to control gangs).

4. See, e.g., Terence R. Boga, *Turf Wars: Street Gangs, Local Governments, and the Battle for Public Space*, 29 HARV. C.R.-C.L. L. REV. 477, 494-502 (1994) (discussing how gang injunctions arguably infringe upon the Assembly Clause of the Constitution); *Developments in the Law—The Paths of Civil Litigation*, 113 HARV. L. REV. 1752, 1766-68 (2000) (questioning the constitutionality of injunctions, including the potential “censorship and discriminatory application” of minorities); Jeffrey J. Mayer, *Individual Moral Responsibility and the Criminalization of Youth Gangs*, 28 WAKE FOREST L. REV. 943, 982-83 (1993) (discussing several antigang initiatives which may not survive constitutional scrutiny); Kim Strosnider, *Anti-Gang Ordinances After City of Chicago v. Morales: The Intersection of Race, Vagueness Doctrine, and Equal Protection in the Criminal Law*, 39 AM. CRIM. L. REV. 101, 115-31 (2002) (addressing antigang injunctions in the context of the Vagueness Doctrine, Substantive Due Process, and Equal Protection); Matt Wawrzyn, *Chicago v. Morales: Constitutional Principles at Loggerheads with Community Action*, 50 DEPAUL L. REV. 371, 417-18 (2000) (discussing the City of Chicago’s attempts to rewrite its gang injunction after the Supreme Court declared it unconstitutional); Matthew Mickle Werdegard, Note, *Enjoining the Constitution: The Use of Public Nuisance Abatement Injunctions Against Urban Street Gangs*, 51 STAN. L. REV. 409, 412 (1999) (arguing that there are several constitutional issues regarding gang injunctions that the Supreme Court has yet to address). But see Gregory S. Walston, *Taking the Constitution at Its Word: A Defense of the Use of Anti-Gang Injunctions*, 54 U. MIAMI L. REV. 47, 48 (1999) (stating that enjoining a gang as a public nuisance is an effective gang prevention technique and one in which law enforcement has had no choice but to employ).

5. See Susan L. Burrell, *Gang Evidence: Issues for Criminal Defense*, 30 SANTA CLARA L. REV. 739, 739 n.2 (1990).

Gangs have been present since at least the early seventeenth century in Europe and the eighteenth century in Asia. They were prevalent in urban centers in this country prior to the nineteenth century, and in the earlier decades of this century. They have persisted in both socialist and free market countries, and in developing as well as developed countries. In some areas of this country, it is reported that particular gangs have operated for more than 60 years.

*Id.*; see also *General Introduction*, in THE MODERN GANG READER vii, vii (Malcolm W. Klein et al. eds., 1995) (tracking changes in gangs that have occurred over thirty years of study); GINI SIKES, 8 BALL CHICKS xxi-xxii (1997) (examining female gang violence); Mary

across the United States.<sup>6</sup> Some of these groups, like modern street gangs, were involved in numerous illegal activities.<sup>7</sup> Others were a function of the social conditions in poor ethnic neighborhoods.<sup>8</sup> In the 1950s and 1960s, gangs were conspicuous in New York, Boston, Chicago, Los Angeles, and Cleveland.<sup>9</sup> Although members participated in illegal activity, it was not the gang's primary focus.<sup>10</sup>

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Romero, *State Violence, and the Social and Legal Construction of Latino Criminality: From El Bandido to Gang Member*, 78 DENV. U. L. REV. 1081, 1088-95 (2001) (analyzing the history of Latino gangs which led to the "Latino criminal stereotype"); Cheryl Renee Rosier, *Former Gang Members' Experiences of Getting in and Getting out of a Gang: A Phenomenological Study 1-27* (1998) (unpublished Ph.D. dissertation, St. Mary's University) (on file with the St. Mary's University, Louis J. Blume Library) (tracing the history of gang activity in the United States). See generally MARTIN SANCHEZ JANKOWSKI, *ISLANDS IN THE STREET: GANGS AND URBAN AMERICAN SOCIETY* (1991) (studying the history of gangs and society's misconception about them); RAÚL DAMACIO TOVARES, *MANUFACTURING THE GANG: MEXICAN AMERICAN YOUTH GANGS ON LOCAL TELEVISION NEWS* (2002) (criticizing the way in which the television media has influenced the Mexican American youth gang story).

6. See FREDERIC M. THRASHER, *THE GANG: A STUDY OF 1,313 GANGS IN CHICAGO* 5 (1937) (investigating gangs in Chicago); see also Cheryl Renee Rosier, *Former Gang Members' Experiences of Getting in and Getting out of a Gang: A Phenomenological Study 5* (1998) (unpublished Ph.D. dissertation, St. Mary's University) (on file with the St. Mary's University, Louis J. Blume Library) (explaining that there were over 25,000 gang members in Chicago by the mid-1920s).

7. See Cheryl Renee Rosier, *Former Gang Members' Experiences of Getting in and Getting out of a Gang: A Phenomenological Study 6* (1998) (unpublished Ph.D. dissertation, St. Mary's University) (on file with the St. Mary's University, Louis J. Blume Library). Rosier views the Los Angeles Chicano gangs as the prototype contemporary gang. *Id.* at 7. They were organized, identifiable, and participated in illegal activities. *Id.*

8. Cheryl Renee Rosier, *Former Gang Members' Experiences of Getting in and Getting out of a Gang: A Phenomenological Study 22* (1998) (unpublished Ph.D. dissertation, St. Mary's University) (on file with the St. Mary's University, Louis J. Blume Library).

9. *Id.* at 6.

10. *Id.* at 22. "Gangs . . . in the 1920s were not universally involved in criminal behavior . . . [they] grew out of the childhood play group and thrived on conflict . . . these gangs emerged from poor and socially disorganized neighborhoods." *Id.* Typically, these gangs had between 50 and 200 members, ranging in age from eleven to the early twenties. *General Introduction*, in *THE MODERN GANG READER* vii, viii (Malcolm W. Klein et al. eds., 1995). The gangs were "significant features" of metropolitan ethnic communities, both minority and white. *Id.* They were "highly territorial" and "committed a wide variety of delinquent offenses of a principally non-serious type." *Id.* However, they were "violent far more in talk than in actions . . . [and] with a few exceptions . . . were not the sources of fear and terror one is accustomed to hearing of now." *Id.*

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Modern gangs emerged during the 1970s.<sup>11</sup> During this time, gangs became more organized and more violent.<sup>12</sup> Guns and other weapons became common; intimidation became an important part of a street gang's arsenal.<sup>13</sup> The violence, complexity, and secrecy that characterized gangs, as well as the apparent racial overtones, generated significant research from social scientists.<sup>14</sup> Much of the recent research has been devoted to intervention.<sup>15</sup> Nonetheless,

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11. See Cheryl Renee Rosier, *Former Gang Members' Experiences of Getting in and Getting out of a Gang: A Phenomenological Study* 7 (1998) (unpublished Ph.D. dissertation, St. Mary's University) (on file with the St. Mary's University, Louis J. Blume Library) (tracing the development of the modern gang).

12. See *id.* (listing violent acts of gang members, such as assault, robbery, and intimidation practices).

13. *Id.*; see also Susan L. Burrell, *Gang Evidence: Issues for Criminal Defense*, 30 SANTA CLARA L. REV. 739, 740 (1990) (commenting on the increased visibility of gang activity and presence of weapons).

14. See Cheryl Renee Rosier, *Former Gang Members' Experiences of Getting in and Getting out of a Gang: A Phenomenological Study* 24-28 (1998) (unpublished Ph.D. dissertation, St. Mary's University) (on file with the St. Mary's University, Louis J. Blume Library). In the 1970s, researchers studied the personality and background of gang members. *Id.* at 24. This focus may have further alienated minority communities. *Id.* at 25. The research tended to show that minority youth often gravitated toward gangs. *Id.* Although the research indicated that the reasons for this phenomenon were often legitimate or at least understandable, public opinion often blamed minority communities for "the gang dilemma." *Id.*; see also Jeffrey J. Mayer, *Individual Moral Responsibility and the Criminalization of Youth Gangs*, 28 WAKE FOREST L. REV. 943, 956-58 (1993). Mayer writes:

The fight against street gangs is a fight against African-American, Hispanic, and, to a lesser degree, Asian youth violence and not against the general plague of American violence. The perceived moral breakdown and unhealthy social ties attributed to gangs are problems now associated with the predominantly minority urban underclass.

*Id.* at 958; see also Cheryl Renee Posier, *Former Gang Members' Experiences of Getting in and Getting out of a Gang: A Phenomenological Study* 26 (1998) (unpublished Ph.D. dissertation, St. Mary's University) (on file with the St. Mary's University, Louis J. Blume Library). Researchers studied Chicano, Black, and female gangs and developed a more systemic approach to the study of gangs. *Id.* In the 1990s, researchers turned to the issues of intervention and prevention. *Id.* at 27.

15. Cheryl Renee Rosier, *Former Gang Members' Experiences of Getting in and Getting out of a Gang: A Phenomenological Study* 27 (1998) (unpublished Ph.D. dissertation, St. Mary's University) (on file with the St. Mary's University, Louis J. Blume Library). In the 1990s, researchers turned to the issues of intervention and prevention. *Id.*

gangs continue to grow, if not in numbers,<sup>16</sup> certainly in complexity.<sup>17</sup>

Gangs operate in most of our major cities<sup>18</sup> and in every American city with a population over 250,000.<sup>19</sup> A gang can have a dozen members or embrace a “federation[ ] of several thousand.”<sup>20</sup> In 2000, there were approximately 24,500 gangs in the United States, comprised of about 772,500 members.<sup>21</sup> In California, estimates of gang members run as high as 200,000.<sup>22</sup> Most gang members, approximately 86%, are minority,<sup>23</sup> and many gangs are multiethnic or multiracial.<sup>24</sup>

Gangs organize for both legitimate and illegitimate reasons.<sup>25</sup> Although there may be major distinctions regarding the history,

16. *National Youth Gang Survey Trends From 1996 to 2000*, OJJDP FACT SHEET (U.S. Dep’t of Justice, The Office of Juvenile Justice and Delinquency Prevention, Wash., D.C.), Feb. 2002, at 1. The National Youth Gang Center estimates that the number of gangs in the United States declined 5% from 1999 to 2000. *Id.* Similarly, the number of gang members decreased by 8% during the same period. *Id.*

17. *See generally* Cheryl Renee Rosier, *Former Gang Members’ Experiences of Getting in and Getting out of a Gang: A Phenomenological Study* 7 (1998) (unpublished Ph.D. dissertation, St. Mary’s University) (on file with the St. Mary’s University, Louis J. Blume Library) (reporting gang activity statistics in which violent crime results, including the number of youths involved).

18. *Id.*

19. OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP’T OF JUSTICE, 1998 NATIONAL YOUTH GANG SURVEY 10 (2000).

20. *General Introduction*, in *THE MODERN GANG READER* vii, viii (Malcolm W. Klein et al. eds., 1995).

21. *National Youth Gang Survey Trends From 1996 to 2000*, OJJDP FACT SHEET (U.S. Dep’t of Justice, The Office of Juvenile Justice and Delinquency Prevention, Wash., D.C.), Feb. 2002, at 1.

22. Matthew Mickle Werdegar, Note, *Enjoining the Constitution: The Use of Public Nuisance Abatement Injunctions Against Urban Street Gangs*, 51 *STAN. L. REV.* 409, 413 (1999). In 1992, the Los Angeles District Attorney’s Office indicated that there were 150,000 gang members in Los Angeles County. *Id.* (citing OFFICE OF THE DIST. ATT’Y, COUNTY OF LOS ANGELES, *GANGS, CRIME AND VIOLENCE IN LOS ANGELES* ii-ix (1992)).

23. *Id.*; OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP’T OF JUSTICE, 1998 NATIONAL YOUTH GANG SURVEY 21 (2000). The survey indicates that nationwide, 46% of the gang members are Hispanic, 34% African-American, 12% Caucasian, 6% Asian, and 2% other. OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP’T OF JUSTICE, 1998 NATIONAL YOUTH GANG SURVEY 21 (2000).

24. OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP’T OF JUSTICE, 1998 NATIONAL YOUTH GANG SURVEY 23-24 (2000). In 1998, 36% of the nation’s gangs were “mixed.” *Id.* at 23.

25. Jeffrey J. Mayer, *Individual Moral Responsibility and the Criminalization of Youth Gangs*, 28 *WAKE FOREST L. REV.* 943, 949 (1993). “Gangs are, and always have been, groups of youths formed for many of the same motives that youths have always organized

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structure, and focus of gangs in different geographical areas,<sup>26</sup> the motives of the members for joining a gang provide a common thread across the nation.<sup>27</sup> For instance, friendship, social identity, peer pressure, and criminal activity are common reasons for gang affiliation.<sup>28</sup> Moreover, gangs may play a significant social role in many poor and minority communities.<sup>29</sup>

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themselves—friendship and social identity as well as the pursuit of delinquent or criminal activities.” *Id.*; see also RAÚL DAMACIO TOVARES, *MANUFACTURING THE GANG: MEXICAN AMERICAN YOUTH GANGS ON LOCAL TELEVISION NEWS 6* (2002) (explaining that gang membership can aid troubled youths in acquiring a feeling of self identity and importance). Gangs, like fraternities, “serve universal needs for peer approval and companionship.” *Id.* Gangs had a social purpose—“We didn’t call ourselves gangs. We called ourselves clubs or *clicas*. . . . It was something to belong to—something that was ours. We weren’t in boy scouts, in sports teams or camping groups. [The gang] is how we wove something out of the threads of nothing.” Terence R. Boga, *Turf Wars: Street Gangs, Local Governments, and the Battle for Public Space*, 29 HARV. C.R.-C.L. L. REV. 477, 487 & n.36 (1994) (quoting LUIS J. RODRIGUEZ, *ALWAYS RUNNING: LA VIDA LOCA: GANG DAYS IN L.A.* 41 (1993)). “Gang membership may also be an important means of self-protection from the many threats confronting residents of disadvantaged neighborhoods.” Lawrence Rosenthal, *Gang Loitering and Race*, 91 J. CRIM. L. & CRIMINOLOGY 99, 124-25 (2000).

26. See Cheryl Renee Rosier, *Former Gang Members’ Experiences of Getting in and Getting out of a Gang: A Phenomenological Study* 28-33 (1998) (unpublished Ph.D. dissertation, St. Mary’s University) (on file with the St. Mary’s University, Louis J. Blume Library). Rosier describes street gangs in Texas, Chicago, Los Angeles, New York City, Omaha, St. Louis, and San Diego. She notes significant differences in the history, structure, racial make-up, and criminal activity of gangs in these cities. *Id.*; see also OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP’T OF JUSTICE, 1998 YOUTH GANG SURVEY 21-35 (demonstrating geographical differences in gangs in 1998).

27. See Jeffrey J. Mayer, *Individual Moral Responsibility and the Criminalization of Youth Gangs*, 28 WAKE FOREST L. REV. 943, 949 (1993) (recognizing friendship, social identity, and criminal activities as motives for gang affiliation); see also Cheryl Renee Rosier, *Former Gang Members’ Experiences of Getting in and Getting out of a Gang: A Phenomenological Study* 34-35 (1998) (unpublished Ph.D. dissertation, St. Mary’s University) (on file with the St. Mary’s University, Louis J. Blume Library) (citing companionship, protection, excitement, and peer pressure as most common reasons for joining a gang).

28. Jeffrey J. Mayer, *Individual Moral Responsibility and the Criminalization of Youth Gangs*, 28 WAKE FOREST L. REV. 943, 949 (1993); see also Cheryl Renee Rosier, *Former Gang Members’ Experiences of Getting in and Getting out of a Gang: A Phenomenological Study* 34-35 (1998) (unpublished Ph.D. dissertation, St. Mary’s University) (on file with the St. Mary’s University, Louis J. Blume Library).

29. MARTIN SANCHEZ JANKOWSKI, *ISLANDS IN THE STREET: GANGS AND URBAN AMERICAN SOCIETY* 179-85 (1991).

[G]angs are not isolated from their communities. They are not ignored or viewed with contempt, and neither . . . are they simply a rung of the social order of low-income, working-class neighborhoods. Rather, they are a formal element in low-income neigh-



Texas has more gangs than any state except California.<sup>30</sup> Texas gangs are primarily located in major cities<sup>31</sup> and range in size from under twenty members to over 1,000.<sup>32</sup> Many gangs are predominately minority;<sup>33</sup> several are exclusively female.<sup>34</sup> Notably, Texas

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borhoods; they operate on an independent and equal basis with all the other organizations active in the low-income community.

*Id.* at 179. Gangs may protect the neighborhood from “social predators.” *See id.* at 185 (recounting a neighborhood resident’s statement that she feels much safer when she sees “our boys” on the street, who would protect her family if her family were attacked). Some gangs have a family tradition of membership. *Id.* at 181. Jankowski relates the story of a forty-seven year old father of four in Los Angeles:

I don’t like the shooting that goes on with gangs today. There is much more than when I was in the gang, but I am proud of my sons being members of the [gang name] because it keeps a family tradition alive; you know my father was in the same gang. It also keeps a community tradition going that is not as bad as the media want to portray it. The gang has helped our community . . . and as far as the violence, well, I just don’t worry because, just like if they [his sons] were in the army, there is a chance that they could be killed, but that is up to God because life has chances that go with it.

*Id.*; *see also* Operation Safe Streets (OSS) Street Gang Detail, *L.A. Style: A Street Gang Manual of the Los Angeles County Sheriff’s Department*, in *THE MODERN GANG READER* 34, 37 (Malcolm W. Klein et al. eds., 1995) (stating that gangs have become more influential in some neighborhoods, with some families even bringing up their children to be gang members).

30. Cheryl Renee Rosier, *Former Gang Members’ Experiences of Getting in and Getting out of a Gang: A Phenomenological Study* 28 (1998) (unpublished Ph.D. dissertation, St. Mary’s University) (on file with the St. Mary’s University, Louis J. Blume Library).

31. *Id.* In 1998, there were 797 gangs in San Antonio, 471 in El Paso, and 250 in Harris County. *Id.* *See generally* JUVENILE CRIME INTERVENTION, OFFICE OF THE ATT’Y GEN., *GANGS IN TEXAS: 2001*, at 1-8 (2002) (explaining the elementary facets of gang membership).

32. Cheryl Renee Rosier, *Former Gang Members’ Experiences of Getting in and Getting out of a Gang: A Phenomenological Study* 28 (1998) (unpublished Ph.D. dissertation, St. Mary’s University) (on file with the St. Mary’s University, Louis J. Blume Library).

33. *Id.* Thirty-four percent of the Texas gangs are predominately Hispanic, 17% are Black, 3% Vietnamese, and 2% White. *Id.* Almost half of Texas’s gangs are racially mixed. *Id.*

34. *See id.* at 28-29. Rosier notes that 63% of the gangs in Texas have both male and female members, while 36% are exclusively male, and 1% exclusively female. Cheryl Renee Rosier, *Former Gang Members’ Experiences of Getting in and Getting out of a Gang: A Phenomenological Study* 29 (1998) (unpublished Ph.D. dissertation, St. Mary’s University) (on file with the St. Mary’s University, Louis J. Blume Library); *see also* Anne Campbell, *Female Participation in Gangs*, in *THE MODERN GANG READER* 70, 70 (Malcolm W. Klein et al. eds., 1995) (chronicling female gang participation from its inception to its current status). *See generally* GINI SIKES, *8 BALL CHICKS* (1997) (discussing female gangs in San Antonio).

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gangs, especially those based in San Antonio, are reputed to be less organized and more violent.<sup>35</sup>

Generally, “gangs and gang-related crime have proven highly resistant to traditional crime fighting methods.”<sup>36</sup> Because of this resistance, the criminal justice system has embraced several nontraditional concepts in an attempt to control the youth street gang.<sup>37</sup> Typically, police,<sup>38</sup> prosecutors,<sup>39</sup> and legislators<sup>40</sup> are the

35. Cheryl Renee Rosier, *Former Gang Members’ Experiences of Getting in and Getting out of a Gang: A Phenomenological Study* 80, 119 (1998) (unpublished Ph.D. dissertation, St. Mary’s University) (on file with the St. Mary’s University, Louis J. Blume Library).

36. Matthew Mickle Werdegar, Note, *Enjoining the Constitution: The Use of Public Nuisance Abatement Injunctions Against Urban Street Gangs*, 51 *STAN. L. REV.* 409, 410 (1999). One commentator writes: “The Criminal Justice System is oriented toward identifying the one individual responsible for the commission of an offense. . . . [G]iven the collective nature of gang crimes, this is an inappropriate response.” Judith Dahmann, *An Evaluation of Operation Hardcore: A Prosecutorial Response to Violent Gang Criminality*, in *THE MODERN GANG READER* 301, 301 (Malcolm W. Klein et al. eds., 1995); see also Stephanie Smith, *Civil Banishment of Gang Members: Circumventing Criminal Due Process Requirements?*, 67 *U. CHI. L. REV.* 1461, 1461 (2000) (stating that “conventional crime-fighting techniques have proven particularly ineffective at reducing gang activity”). But see Terence R. Boga, *Turf Wars: Street Gangs, Local Governments, and the Battle for Public Space*, 29 *HARV. C.R.-C.L. L. REV.* 477, 490 (1994) (arguing that gang problems can be curbed by crime fighting strategies); Jeffrey J. Mayer, *Individual Moral Responsibility and the Criminalization of Youth Gangs*, 28 *WAKE FOREST L. REV.* 943, 945 (1993) (proposing a more effective method of curbing gang activity). Mr. Mayer views these nontraditional concepts as “style” founded in public panic. *Id.* He believes that “efforts to prosecute gangs and gang members on the basis of social ties is a panic response to a misunderstood crisis” and that “[c]riminal liability should be ascribed according to traditional legal principles and not to gangs as social entities, as proposed in various anti-gang initiatives.” *Id.* at 949-50.

37. See Susan L. Burrell, *Gang Evidence: Issues for Criminal Defense*, 30 *SANTA CLARA L. REV.* 739, 742-46 (1990) (discussing several approaches that the LAPD has used to control gang violence); see also *Developments in the Law—The Paths of Civil Litigation*, 113 *HARV. L. REV.* 1752, 1760 (2000) (citing the growing use of civil litigation to fight crime); Matthew Mickle Werdegar, Note, *Enjoining the Constitution: The Use of Public Nuisance Abatement Injunctions Against Urban Street Gangs*, 51 *STAN. L. REV.* 409, 410-11 (1999) (recognizing the authorities’ use of nontraditional strategies).

38. See Cheryl Renee Rosier, *Former Gang Members’ Experiences of Getting in and Getting out of A Gang: A Phenomenological Study* 43 (1998) (unpublished Ph.D. dissertation, St. Mary’s University) (on file with the St. Mary’s University, Louis J. Blume Library) (stating that many police departments have instituted special gang units to deal with gang activity); see also Susan L. Burrell, *Gang Evidence: Issues for Criminal Defense*, 30 *SANTA CLARA L. REV.* 739, 742 n.10 (1990). Police have resorted to public threats to curb gang activity. After several gang-related shootings in Los Angeles, Chief of Police Daryl Gates vowed “to ‘obliterate’ the violent gangs and to take ‘these little terrorists’ off the streets.” *Id.* In Los Angeles, “sweeps,” a practice in which police would stop and interrogate suspected gang members, were implemented to combat gang activity. *Id.* at 742. The goal of

primary actors in the fight against gangs. Their “efforts have clearly favored prosecution and punishment over social services.”<sup>41</sup>

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the sweeps was “to make life miserable for the gang members and make police visible to area residents.” *Id.* at 742-43. Reports indicated that the Los Angeles sweeps were not successful in rounding up or prosecuting gang members. *Id.* at 743 & n.17. Another highly visible maneuver employed by law enforcement are “jumpouts.” Lenese C. Herbert, *Can't You See What I'm Saying? Making Expressive Conduct a Crime in High-Crime Areas*, 9 GEO. J. ON POVERTY L. & POL'Y 135, 136-37 (2002). A “jumpout” is a highly visible maneuver where “specially trained officers in one or more unmarked vehicles aggressively drive up to gatherings of people in high-crime areas, rapidly exit their police vehicles . . . and surprise the assembled. The swiftest go free. The slowest are subject to, at a minimum, verbal questioning and physical searches.” *Id.*

39. See Susan L. Burrell, *Gang Evidence: Issues for Criminal Defense*, 30 SANTA CLARA L. REV. 739, 744 (1990). Prosecutors respond to public pressure regarding gangs by aggressively investigating, charging, and litigating gang-related cases. *Id.* Additionally, a District Attorney's Office can develop special gang prosecution units that specialize in gang litigation. *Id.* A District Attorney's Office may direct its energy at the parents of gang members, forcing them to post bonds for their children, cracking down on truancy and curfew violations, or arresting them under parental responsibility statutes. *Id.* at 744-45. However, commentators have noted that “because most local prosecutors are elected officials, they have an incentive to litigate against unpopular and politically weak groups.” *Developments in the Law—The Paths of Civil Litigation*, 113 HARV. L. REV. 1752, 1760 (2000).

40. See CAL. PENAL CODE § 186.20-186.27 (West 1988 & Supp. 1989). The Street Terrorism Enforcement and Prevention Act of 1988 (STEP) is the prototype legislative initiative addressing street gang activity. *Id.* In addition to prohibiting illegal gang activity, the Act includes sentence enhancements, a nuisance provision, and provisions making parents responsible for their children's gang activities. Susan L. Burrell, *Gang Evidence: Issues for Criminal Defense*, 30 SANTA CLARA L. REV. 739, 745 n.24-25 (1990) (describing the difficulty in prosecuting gang activity). Legislatures have also created new, gang-related crimes such as gang recruitment. Kim Strosnider, *Anti-Gang Ordinances After City of Chicago v. Morales: The Intersection of Race, Vagueness Doctrine, and Equal Protection in the Criminal Law*, 39 AM. CRIM. L. REV. 101, 106-07 (2002). Ms. Strosnider's survey indicates that “[T]wenty-eight states and the District of Columbia now have gang-specific criminal laws” and that “[t]en states have comprehensive or omnibus statutory schemes dealing with gangs, many of them patterned after California's STEP Act or federal racketeering law” (citation omitted). *Id.* at 107. Additional gang-focused legislation includes provisions for sentence enhancements for gang members, loitering ordinances, prohibiting tattooing minors, evicting gang members from housing, and making parents civilly liable for encouraging their children's participation in gangs. *Id.* at 107-08.

41. Susan L. Burrell, *Gang Evidence: Issues for Criminal Defense*, 30 SANTA CLARA L. REV. 739, 745-46 (1990); see also Joan W. Howarth, *Toward the Restorative Constitution: A Restorative Justice Critique of Anti-Gang Public Nuisance Injunctions*, 27 HASTINGS CONST. L.Q. 717, 725 (2000) (describing governmental efforts in response to the increased gang problem); Francisco Villarruel & Nancy E. Walker, *¿Dónde Está la Justicia? A Call to Action on Behalf of Latino and Latina Youth in the U.S. Justice System* (Inst. for Children, Youth, and Families/Mich. St. U., E. Lansing, Mich.), July 2002, at 14-21 (demonstrating recent use of the public nuisance injunction to prevent gang members from associating in public).

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In addition, judges have also begun to play an important role.<sup>42</sup> The most recent weapon of choice is the civil gang injunction.<sup>43</sup>

## II. THE CIVIL GANG INJUNCTION

### A. History

The first civil gang injunction appeared in California in 1987.<sup>44</sup> The Los Angeles City Attorney's Office characterized the injunction as "a powerful new weapon in the fight against gang violence."<sup>45</sup> The City Attorney sought the injunction against individual alleged members of the Playboy Gangster Crips Gang, a

42. Maro Robbins, *Republicans Have Edge, but Races too Close to Call*, SAN ANTONIO EXPRESS-NEWS, Nov. 6, 2002, at 15A, 2002 WL 102860654. Bexar County Court of Law Judge Wayne Christian crowed on election night 2002: "'If I win, it looks like the voters of Bexar County appreciate my tough stance on justice . . . . If I lose, all the gang members in San Antonio will be celebrating. . . .'" *Id.* Bexar County voters chose not to re-elect Christian to the County Court bench. Sonja Garza, *Voters Just Say No to M'Liss Christian; Judges Were on the Edge of Their Benches*, SAN ANTONIO EXPRESS-NEWS, Nov. 7, 2002, at 14A, 2002 WL 102860935.

43. *Developments in the Law—The Paths of Civil Litigation*, 113 HARV. L. REV. 1752, 1759-60 (2000). "[U]sing civil litigation to combat crime . . . takes advantage of the civil law's flexibility to respond to newly recognized problems and exploits its substantive reach to go beyond the crimes at issue to address their alleged underlying causes." *Id.*

44. *False Premise/False Promise: The Blythe Street Gang Injunction and Its Aftermath* (ACLU Found. of S. Cal., L.A., Cal.), May 1997, at 1, <http://www.aclu-sc.org/docs/blythe.pdf>; see also Terence R. Boga, *Turf Wars: Street Gangs, Local Governments, and the Battle for Public Space*, 29 HARV. C.R.-C.L. L. REV. 477, 478 (1994). Mr. Boga also describes a 1982 court order certifying several local gangs as legal entities and ordering their members to paint over graffiti for at least five hours. "Of the seventy-two individuals served with the order, sixty-four eventually reported . . . for work detail." *Id.* at 480; see also Gary Stewart, Note, *Black Codes and Broken Windows: The Legacy of Racial Hegemony in Anti-Gang Civil Injunctions*, 107 YALE L.J. 2249, 2258-59. Stewart argues that societies have used vagrancy legislation to control "undesireables" as far back as the fourteenth century. *Id.* In the United States, racial minorities

have always been a primary victim . . . black people have historically been targeted by vagrancy ordinances. This was especially true after the Civil War, when southern legislators sought innovative ways to constrain black populations that were then technically free. . . . Designed to force the freed slaves to work for their former masters, the Black Codes relied upon broadly defined vagrancy statutes as the central mechanism for regulating the black workforce. Under this system of socioeconomic domination, the prospect of being arrested and charged with vagrancy deterred black laborers from leaving their former masters' plantations.

*Id.* at 2258-59 (citation omitted).

45. *False Premise/False Promise: The Blythe Street Gang Injunction and Its Aftermath* (ACLU Found. of S. Cal., L.A., Cal.), May 1997, at 1, <http://www.aclu-sc.org/docs/blythe.pdf>. Officials claimed the injunction was "'the nation's first legal offensive against a street gang.'" *Id.*

neighborhood gang in West Los Angeles.<sup>46</sup> The injunction sought to prohibit alleged gang members “from congregating together, talking on the street, littering or remaining in public for more than five minutes at a time.”<sup>47</sup> Judge Deering granted six of the twenty-three prohibitions sought in the injunction.<sup>48</sup> Judge Deering rejected the remaining provisions, including those enacting a curfew, prohibiting the defendants from wearing certain clothing, and prohibiting the defendants from associating with each other.<sup>49</sup> The judge ruled these provisions “overbroad in content” and “far, far overreaching.”<sup>50</sup>

In 1993, the Los Angeles City Attorney filed for an injunction against five hundred alleged members of a Latino street gang known as the Blythe Street Gang.<sup>51</sup> Constitutional law experts as well as local and national organizations, including the American Civil Liberties Union (ACLU), criticized the injunction.<sup>52</sup> The ACLU claimed the injunction would “outlaw otherwise legal activity,” criminalizing activities such as conversing with friends or visiting neighbors.<sup>53</sup> Additionally, opponents of the injunction argued that the criminal activities of the Blythe Street Gangs could best be controlled through existing law enforcement techniques and procedures.<sup>54</sup> Nevertheless, the court granted the injunction.<sup>55</sup>

Gang injunctions soon became a popular weapon in the fight to curb gang activity in numerous California cities, including San Jose, San Diego, Burbank, Pasadena, and Redondo Beach.<sup>56</sup> Meanwhile, the concept received a boost when California Governor Pete

46. *Id.*

47. *Id.*

48. Matthew Mickle Werdegar, Note, *Enjoining the Constitution: The Use of Public Nuisance Abatement Injunctions Against Urban Street Gangs*, 51 STAN. L. REV. 409, 414 (1999).

49. *Id.* at 414-15.

50. *Id.*

51. *False Promise/False Promise: The Blythe Street Gang Injunction and Its Aftermath* (ACLU Found. of S. Cal., L.A., Cal.), May 1997, at 1, <http://www.aclu-sc.org/docs/blythe.pdf>.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* at 1-2.

56. *False Promise/False Promise: The Blythe Street Gang Injunction and Its Aftermath* (ACLU Found. of S. Cal., L.A., Cal.), May 1997, at 2, <http://www.aclu-sc.org/docs/blythe.pdf>.

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Wilson budgeted \$2.5 million for a “Gang Civil Injunction Fund,” providing funding to local prosecutors who sought gang injunctions.<sup>57</sup> Then, in 1997, the California Supreme Court decided *People ex. rel. Gallo v. Acuna*,<sup>58</sup> which upheld the constitutionality of several troubling provisions contained in an antigang injunction.<sup>59</sup>

At the core of *Acuna* were two provisions contained in several injunctions that the San Jose City Attorney had obtained against alleged street gang members.<sup>60</sup> The California Supreme Court characterized the target area, Rocksprings, as an “urban war zone” where gang members terrorized the community through a variety of criminal acts including murder, drive-by shootings, vandalism, graffiti, and theft.<sup>61</sup> The city alleged that the defendants’ gang activities over the previous twelve months constituted a public nuisance.<sup>62</sup> The superior court granted the injunction against thirty-eight named defendants.<sup>63</sup> On appeal, the court of appeal upheld the provisions of the injunction that prohibited acts that were criminal; ultimately, fifteen of the injunction’s twenty-four provisions were declared unconstitutionally vague and therefore invalid.<sup>64</sup>

The California Supreme Court granted review of two of the injunction’s provisions.<sup>65</sup> The court held that a provision “enjoining defendants from ‘[s]tanding, sitting, walking, driving, gathering or appearing anywhere in public view with any other defendant . . . or with any other known [member of several gangs]’” did not violate the defendants’ First Amendment rights of association,<sup>66</sup> nor was it overbroad,<sup>67</sup> or vague.<sup>68</sup> The court also considered the provision that prohibited defendants from “‘confronting, intimidating, annoying, harassing, threatening, challenging, provoking, assaulting

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57. *Id.* at 1.

58. 929 P.2d 596 (Cal. 1997).

59. *See People ex rel. Gallo v. Acuna*, 929 P.2d 596, 597 (Cal. 1997) (holding that an injunction’s proviso restricting gang members from appearing with other gang members did not violate the First Amendment Right to Associate).

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

61. *Id.*

62. *Id.* at 602.

63. *Id.*

64. *Id.*

65. *Acuna*, 929 P.2d at 602.

66. *Id.* at 608.

67. *Id.* at 610.

68. *Id.* at 614.

and/or battering any residents or patrons, or visitors to “Rock-springs” . . . known to have complained about gang activities” and concluded that it was not vague.<sup>69</sup>

A major challenge to antigang legislation was decided by the Supreme Court of the United States in *City of Chicago v. Morales*.<sup>70</sup> In 1992, Chicago enacted an ordinance that required police officers who observed a “criminal street gang member loitering in any public place with one or more other persons” to order them to disperse.<sup>71</sup> The Supreme Court of Illinois held that the ordinance violated the Due Process Clause of the Fourteenth Amendment.<sup>72</sup> In *Morales*, a majority of the United States Supreme Court agreed, holding that the ordinance failed to establish minimum guidelines for police.<sup>73</sup> After *Morales*, municipalities and lower courts have struggled with vagueness and equal protection concerns.<sup>74</sup>

#### B. *Texas*

Although civil gang injunctions have been used for over a decade in California and Chicago, Texas cities such as Austin and San Antonio have only recently begun aggressively using them to address gang violence.<sup>75</sup> In 1998, the Travis County District Attorney's Office sought a civil injunction to prohibit gang members from “[s]tanding, sitting, walking, driving, gathering or appearing anywhere in public view [within the target area] with any other defendant herein, or with any other known 2-3 Crip criminal street

69. *Id.* at 613 (quoting the lower court).

70. 527 U.S. 41 (1999).

71. *City of Chicago v. Morales*, 527 U.S. 41, 47 n.2 (1999).

72. *City of Chicago v. Morales*, 687 N.E.2d 53, 65 (Ill. 1997).

73. *Morales*, 527 U.S. at 60-61.

74. See Kim Strosnider, *Anti-Gang Ordinances After City of Chicago v. Morales: The Intersection of Race, Vagueness Doctrine, and Equal Protection in the Criminal Law*, 39 AM. CRIM. L. REV. 101, 124-36 (2002) (recognizing the dilemma in creating antigang ordinances with respect to the vagueness doctrine and equal protection, and examining how courts, and specifically the City of Chicago, are affected by *Morales* in determining the constitutionality of antigang legislation).

75. See John W. Gonzalez, *Judge Limits Suspects with “Gang Injunction,”* HOUS. CHRON., Aug. 1, 1998, at 1, 1998 WL 3591478 (discussing the first gang injunction in Austin); see also Stacie Orsagh-Aguillon, *East Side Crime Heading Downward; Statistics Show Aggressive Police Work Reducing Incidents*, SAN ANTONIO EXPRESS-NEWS, Apr. 3, 2002, at 1H, 2002 WL 17513177 (reporting the success of the civil gang injunctions imposed on San Antonio's east side).

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gang member.”<sup>76</sup> The injunction also sought to prohibit the defendants from

[c]ommunicating or attempting to communicate with the occupants of any vehicle . . . [u]sing or possessing pagers or beepers . . . [w]earing clothes which bear the name, colors or letters of the criminal street gang known as 2-3 Crips . . . [u]sing words, phrases, physical gestures, or symbols . . . which describe or refer to the gang known as “2-3 Crips.”<sup>77</sup>

At the time, the injunction raised concerns among the neighborhood residents.<sup>78</sup> Even the president of the neighborhood association questioned the constitutionality of the injunction.<sup>79</sup>

In 1999, Bexar County District Attorney Susan Reed filed a petition for a temporary injunction against the allegedly documented members of two street gangs, the Klik and the Klan.<sup>80</sup> The injunction was linked to a federal government pilot program targeting gang activities in five U.S. cities.<sup>81</sup> Similar to its predecessor in Austin, the San Antonio injunction prohibited the named defendants from engaging in activities that were already illegal, such as possessing weapons and fighting.<sup>82</sup> As in the Austin case, the injunction also prohibited the defendants from “[a]ssociating, standing, sitting, walking, driving, bicycling, gathering or appearing anywhere in public view with any other Defendant herein, or with any other person known to the Defendant to be a Klik or Klan member” within the target area.<sup>83</sup> The injunction also prohibited the defendants from “[c]ommunicating with or attempting to communicate with the occupants of any vehicle.”<sup>84</sup> A violation of the

76. *State v. Jefferson*, No. 9807051 (147th Dist. Ct., Travis County, Tex. July 2, 1998).

77. *Id.*

78. Editorial, *Use of Injunctions and Protecting Rights*, AUSTIN AM.-STATESMAN, July 5, 1998, at G2.

79. *See id.* (expressing concerns that gang injunctions will affect freedom of assembly).

80. Press Release, Bexar County District Attorney, Gang Member Held in Contempt for Violation of Gang Injunction (Jan. 24, 2001); *see also State v. Campos*, No. 99-CI-09648 (37th Dist. Ct., Bexar County, Tex. July 6, 1999); *Officials Jail Teen in Violation of Injunction*, SAN ANTONIO EXPRESS-NEWS, Jan. 25, 2001, at 2B, 2001 WL 5228330.

81. Kevin Mayhood, *Community Effort Vital in Deterring Gangs, Experts Say*, THE COLUMBUS DISPATCH, Sept. 5, 1995, at 2A, 1995 WL 9886998.

82. *State v. Campos*, No. 99-CI-09648 (37th Dist. Ct., Bexar County, Tex. July 6, 1999).

83. *Id.*

84. *Id.*



injunction was a Class A misdemeanor,<sup>85</sup> punishable by up to one year in jail and a \$4,000 fine, or both.<sup>86</sup> Since 1999, the Bexar County District Attorney has successfully obtained four injunctions in San Antonio.<sup>87</sup>

### III. IDENTIFICATION OF GANG MEMBERS

#### A. *The Gang Expert*

The threshold issue in the enforcement of a gang injunction is the identification of the defendant as a gang member. Typically, the identification comes from an opinion given by a gang expert who has had significant law enforcement training focusing on gangs and gang-related crime.<sup>88</sup> The expert, often a police officer, will give his opinion via affidavit regarding the existence of a gang,<sup>89</sup> and whether the defendants are members of that particular gang.<sup>90</sup> Apparently, boilerplate affidavits are available for police officers'

85. TEX. PEN. CODE ANN. § 71.021 (Vernon Supp. 2003).

86. TEX. PEN. CODE ANN. § 12.21 (Vernon 1993).

87. Stacie Orsagh-Aguillon, *East Side Crime Heading Downward; Statistics Show Aggressive Police Work Reducing Incidents*, SAN ANTONIO EXPRESS-NEWS, Apr. 3, 2002, at 1H, 2002 WL 17513177.

88. *See State v. Campos*, No. 99-CI-09648 (37th Dist. Ct., Bexar County, Tex. July 6, 1999). In his affidavit, Detective Dyer testified regarding his twelve years of experience in the San Antonio Police Department (SAPD), his experience with the SAPD Gang Unit and the Street Crime Arrest Unit, and as a Detective with the Youth Crimes Detail. *Id.* His affidavit indicates "over 150 hours of specialized education and training on the subject of criminal street gangs" including several courses on advanced gang investigation. *Id.* Through his affidavit, Detective Dyer testified that he began teaching gang-related courses in 1991. *Id.* Detective Dyer also testified that he has been qualified and testified as a "gang expert" in both state and federal courts in San Antonio. *Id.*

89. *See State v. Campos*, No. 99-CI-09648 (37th Dist. Ct., Bexar County, Tex. July 6, 1999). Detective Dyer testified that his official duties include determining whether a gang meets the definition of a "criminal street gang," as defined in section 71.01 of the Texas Penal Code. *Id.* His affidavit stated that a "criminal street gang" means three or more persons having a common sign, symbol, or identifiable leadership who continuously or regularly associate in the commission of criminal activities. *Id.* Upon reviewing recent crime reports and field profile sheets, Detective Dyer testified that the identified gangs in the instant case were "'criminal street gangs' engaged in criminal activity." *Id.*

90. *State v. Campos*, No. 99-CI-09648 (37th Dist. Ct., Bexar County, Tex. July 6, 1999). Detective Dyer's affidavit lists the criteria used by the San Antonio Police Department to identify gang members. *Id.* The six criteria are

- (1) A subject admits being a member of a gang;
- (2) a reliable person identifies another individual as a gang member;
- (3) a person of untested reliability identifies another person as a gang member and it is corroborated by independent information;

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testimony.<sup>91</sup> Generally, the testimony of gang experts proffering opinions about gang membership has been considered sufficiently reliable to satisfy the admissibility requirements for expert opinions.<sup>92</sup> However, a close examination of the underlying data com-

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- (4) an individual resides in or frequents a particular gang's area and affects his/her style of dress, use of hand signs, symbols or tattoos and associates or is photographed with known gang members;
  - (5) when an individual has tattoos, wears or possesses clothing and/or other paraphernalia that is only associated with a specific gang;
  - (6) an individual is arrested participating in delinquent or criminal activities with known documented gang members.

*Id.* For the most part, these criteria track article 61.02 of the Texas Code of Criminal Procedure. According to the Texas Code of Criminal Procedure, a law enforcement officer may identify a person as a member of a criminal street gang if he meets two of the following:

- (A) [A] self-admission by the individual of criminal street gang membership;
- (B) an identification of the individual as a criminal street gang member by a reliable informant or other individual;
- (C) a corroborated identification of the individual as a criminal street gang member by an informant or other individual of unknown reliability;
- (D) evidence that the individual frequents a documented area of a criminal street gang, associates with known criminal street gang members, and uses criminal street gang dress, hand signals, tattoos, or symbols; or
- (E) evidence that the individual has been arrested or taken into custody with known criminal street gang members for an offense or conduct consistent with criminal street gang activity.

TEX. CODE CRIM. PROC. ANN. art. 61.02 (Vernon 2002). After a review of "recent crime reports and field profile sheets . . . as well as . . . video tapes and photographs of gang members," Dyer lists thirty-eight alleged gang members, each with short criminal profiles. *State v. Campos*, No. 99-CI-09648 (37th Dist. Ct., Bexar County, Tex. July 6, 1999). The majority of the individual profiles begin with the statement, "[The defendant] is a documented [Klick/Klan] gang member in the San Antonio Police Department's Gang Profile Information System." *Id.* Several individuals have profiles introduced with the statement, "Although not documented with the San Antonio Police Department's Gang Profile Information System, [the defendant] is in fact a [Klick/Klan] gang member." *Id.*

91. Compare *State v. Campos*, No. 99-CI-09648 (37th Dist. Ct., Bexar County, Tex. July 6, 1999), with *State v. Jefferson*, No. 9807051 (147th Dist. Ct., Travis County, Tex. July 2, 1998). A comparison of Detective Dyer's testimony in *State v. Campos* with the testimony of Austin Police Department Officer Ralph Tijerina in *State v. Jefferson* indicates that the two affidavits contained identical language in many parts. *State v. Campos*, No. 99-CI-09648 (37th Dist. Ct., Bexar County, Tex. July 6, 1999); *State v. Jefferson*, No. 9807051 (147th Dist. Ct., Travis County, Tex. July 2, 1998).

92. See *King v. State*, 29 S.W.3d 556, 560 (Tex. Crim. App. 2000) (allowing expert testimony about gangs); *Jones v. State*, 944 S.W.2d 642, 652-53 (Tex. Crim. App. 1996) (acknowledging that expert testimony about gangs and their activities at the punishment phase of trial is proper under Texas law); see also *Jones v. State*, No. 08-01-00056-CR, 2002 WL 830861, at \*3 (Tex. App.—El Paso May 2, 2002, pet. ref'd) (not designated for publication) (noting that expert testimony about gangs is commonly accepted by Texas courts);

monly used by gang experts in the context of Texas Rule of Evidence 702 suggests that such testimony lacks the reliability necessary to support the opinions of experts regarding gang membership.

### B. *Texas Rule of Evidence 702*

Like all expert testimony, the testimony of gang experts regarding gang membership must meet the relevance and reliability requirements of Texas Rule of Evidence 702.<sup>93</sup> Rule 702, along with Rules 401, 403, and 703, require the trial judge to act as a “gatekeeper,” limiting the testimony of expert witnesses.<sup>94</sup> Expert testimony offered pursuant to Rule 702 must survive a traditional

Godwin v. State, No. 01-99-0830-CR, 2000 WL 1678451, at \*2 (Tex. App.—Houston [1st Dist.] Nov. 9, 2000, pet. ref'd) (not designated for publication) (stating that relevant evidence of gang membership or gang association may be admitted at the punishment phase of trial).

93. TEX. R. EVID. 702. The rule states that “[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.” *Id.* Prior to the 2000 amendment to the federal rule, with the exception of a comma after the word “education,” the corresponding federal rule was identical to its Texas counterpart. *See Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 727 (Tex. 1998) (comparing Texas Rule of Evidence 702 to the Federal Rule 702 and recognizing that the two rules were identical, but for one comma). Federal Rule 702 now reads:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

FED. R. EVID. 702. The federal rule was amended in response to *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993) and its progeny. FED. R. EVID. 702 advisory committee’s note (2000 amendment). “The amendment affirms the trial court’s role as gatekeeper and provides some general standards that the trial court must use to assess the reliability and helpfulness of proffered expert testimony.” *Id.*

94. Judge Harvey Brown, *Eight Gates for Expert Witnesses*, 36 HOUS. L. REV. 743, 744 (1999); *see also* *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 587 (1993) (announcing that Federal Rule of Evidence 702 superseded the general acceptance test for expert witness testimony articulated in *Frye v. United States* seventy years earlier); *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923) (promulgating the general acceptance test for the admissibility of expert witness testimony); David E. Colmenero, *A Dose of Daubert to Alleviate “Junk Science” in Texas Courtrooms: Texas Adopts the Federal Standard for Determining the Admissibility of Scientific Expert Testimony*, 27 TEX. TECH L. REV. 293, 294 (1996) (asserting that judges have an affirmative duty to determine relevancy and reliability of expert testimony).

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relevancy analysis under Rules 401 and 402 of the Texas Rules of Evidence.<sup>95</sup>

Additionally, the scientific technique or procedure must be reliable.<sup>96</sup> When determining the reliability of a scientific technique or theory, a trial court may consider any number of factors, including but not limited to: (1) the extent to which the theory has been or can be tested; (2) the extent to which the technique relies upon the subjective interpretation of the expert; (3) whether the theory has been subjected to peer review and/or publication; (4) the technique's potential rate of error; (5) whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and (6) the nonjudicial uses which have been made of the theory or technique.<sup>97</sup>

Similarly, the testimony of experts testifying about nonscientific matters must be both relevant and reliable.<sup>98</sup> Nonscientific expert testimony presents trial courts with special concerns.<sup>99</sup> For example, nonscientific testimony may be based on experience and obser-

95. *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 556 (Tex. 1995). Texas Rule of Evidence 702 requires the evidence to "assist the trier of fact to understand the evidence or to determine a fact in issue." TEX. R. EVID. 702.

96. *Robinson*, 923 S.W.2d at 557.

97. *Id.*; see also *Daubert*, 509 U.S. at 593-94 (stating that many factors are considered when determining reliability).

98. See *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999) (concluding that a trial judge's "gatekeeping" duty applies to both scientific and nonscientific expert testimony). Prior to the Court's holding in *Kumho*, courts did not have standard reliability factors regarding nonscientific expert testimony. Edward J. Imwinkelried, *The Next Step After Daubert: Developing a Similarly Epistemological Approach to Ensuring the Reliability of Nonscientific Expert Testimony*, 15 *CARDOZO L. REV.* 2271, 2280-81 (1994). In *Daubert*, the Court left unresolved the issue of how courts should determine the admissibility of nonscientific expert testimony. *Daubert*, 509 U.S. at 590 n.8. Thus, the *Kumho* Court resolved the issue by applying *Daubert's* general holding, which was applicable to "'scientific' knowledge, . . . to testimony based on 'technical' and 'other specialized'" fields of knowledge as well. *Kumho*, 526 U.S. at 141; see also *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 727 (Tex. 1998) (holding relevance and reliability requirements under Texas Rule 702 apply to all evidence offered under that rule even though the criteria for each assessment may vary depending upon the nature of the evidence).

99. See Emily L. Baggett, Note, *The Standards Applied to the Admission of Soft Science Experts in State Courts*, 26 *AM. J. TRIAL ADVOC.* 149, 156 (2002) (stating that judges may find it difficult to distinguish between scientific and nonscientific evidence); Jason G. Duncan, Note, "A Pig's Breakfast": *Judicial Gatekeeping for Scientific and Specialized Expert Testimony*, 6 *SUFFOLK J. TRIAL & APP. ADVOC.* 21, 29 (2001) (recognizing the difficulty in distinguishing between scientific and nonscientific knowledge and stating that the judge's role is "to ensure that expert testimony is reliable, relevant, and helpful to the jury regardless of whether" the testimony is scientific or not).

vation that cannot be objectively tested.<sup>100</sup> Because nonscientific disciplines do not lend themselves to systematic scrutiny based on objective retesting, the data often cannot be validated.<sup>101</sup> Also, nonscientific expert testimony may be more difficult to attack through cross-examination.<sup>102</sup> Thus, “there is less assurance of the accuracy and truthfulness of nonscientific expert testimony.”<sup>103</sup>

Texas courts consider the *Daubert/Robinson* factors when deciding whether nonscientific evidence is reliable.<sup>104</sup> In cases where the expert’s opinion is based more on skill and experience, courts may not find the factors listed in *Daubert v. Merrell Dow Pharm., Inc.*<sup>105</sup> and *E.I. du Pont de Nemours & Co. v. Robinson*<sup>106</sup> helpful in determining the reliability of the expert’s testimony.<sup>107</sup> In these cases, courts are charged with determining whether there is “too great an analytical gap between the data and the opinion proffered.”<sup>108</sup> The crucial inquiry in the “analytical gap” test is whether the expert relied on objective data or experimentation, or subjective interpre-

100. See Emily L. Baggett, Note, *The Standards Applied to the Admission of Soft Science Experts in State Courts*, 26 AM. J. TRIAL ADVOC. 149, 156 (2002) (explaining that science divides between physical and social sciences whereas the law classifies physical sciences as “hard” scientific knowledge and the social sciences are “soft” scientific knowledge). Nonscientific knowledge—the “soft,” social science—typically deals with human behavior in both social and cultural aspects. *Id.*

101. See *Weatherred v. State*, 15 S.W.3d 540, 542 n.5 (Tex. Crim. App. 2000) (stating that “[t]he ‘hard’ sciences, areas in which precise measurement, calculation, and prediction are generally possible, include mathematics, physical science, earth science, and life science,” whereas “the ‘soft’ sciences, in contrast, are generally thought to include such fields as psychology, economics, political science, anthropology, and sociology”). Edward J. Imwinkelried, *The Next Step After Daubert: Developing a Similarly Epistemological Approach to Ensuring the Reliability of Nonscientific Expert Testimony*, 15 CARDOZO L. REV. 2271, 2279 (1994) (describing the process of double checking the outcome of an experiment and explaining how the lack of that process in the area of nonscientific testimony raises issues concerning accuracy and truthfulness).

102. Jason G. Duncan, Note, “A Pig’s Breakfast”: *Judicial Gatekeeping for Scientific and Specialized Expert Testimony*, 6 SUFFOLK J. TRIAL & APP. ADVOC. 21, 30 (2001).

103. Edward J. Imwinkelried, *The Next Step After Daubert: Developing a Similarly Epistemological Approach to Ensuring the Reliability of Nonscientific Expert Testimony*, 15 CARDOZO L. REV. 2271, 2279 (1994).

104. *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 726 (Tex. 1998).

105. 509 U.S. 579 (1993).

106. 923 S.W.2d 549 (Tex. 1995).

107. *Gammill*, 972 S.W.2d at 726 (stating that *Daubert* and *Robinson* considerations are not always useful in assessing nonscientific testimony).

108. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997); *Gammill*, 972 S.W.2d at 726.

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tations.<sup>109</sup> Texas courts have consistently held that expert opinions with little more than a “subjective belief or unsupported speculation” are unreliable and therefore inadmissible.<sup>110</sup>

In Texas, the analysis employed to determine how the reliability of particular expert testimony is to be assessed is within the trial judge’s discretion.<sup>111</sup> Further, whether a court analyzes the reliability of an expert’s testimony using the *Daubert/Robinson* factors, the “analytical gap” test, or a combination of the two, “[i]n light of the increased use of expert witnesses and the likely prejudicial impact of their testimony, trial judges have a heightened responsibility to ensure that expert testimony show some indicia of reliability.”<sup>112</sup> In short, “it is not so simply because ‘an expert says it is so.’”<sup>113</sup>

Judge Harvey Brown has constructed a framework which is helpful when considering whether expert testimony, scientific or non-scientific, should be admitted.<sup>114</sup> Using state and federal court decisions from the past decade, Judge Brown suggests that “an expert’s testimony must pass [through] eight different gates to be admissible.”<sup>115</sup> Helpfulness is the first gate,<sup>116</sup> followed by qualifications,<sup>117</sup> relevancy,<sup>118</sup> methodological reliability,<sup>119</sup> connec-

109. See *Ford Motor Co. v. Aguiniga*, 9 S.W.3d 252, 263 (Tex. App.—San Antonio 1999, pet. denied) (identifying the concern as whether experts relied on subjective interpretation or on objective data or interpretation).

110. *Gammill*, 972 S.W.2d at 728; *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 557 (Tex. 1995).

111. *Gammill*, 972 S.W.2d at 726.

112. *Robinson*, 923 S.W.2d at 553.

113. *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 712 (Tex. 1997) (quoting *Viterbo v. Dow Chem. Co.*, 826 F.2d 420, 421 (5th Cir. 1987)).

114. See generally Judge Harvey Brown, *Eight Gates for Expert Witnesses*, 36 HOUS. L. REV. 743 (1999) (listing eight “gates” or factors to be considered when determining admissibility); Judge Harvey Brown, *Procedural Issues Under Daubert*, 36 HOUS. L. REV. 1133 (1999).

115. Judge Harvey Brown, *Eight Gates for Expert Witnesses*, 36 HOUS. L. REV. 743, 745 (1999).

116. *Id.* at 746, 751-57. Under Rule 702, the proffered testimony must assist the trier of fact. TEX. R. EVID. 702. “If the fact-finder is equally competent to examine an issue, the court will strike the expert’s opinion under the helpfulness standard.” Judge Harvey Brown, *Eight Gates for Expert Witnesses*, 36 HOUS. L. REV. 743, 746 (1999). The helpfulness gate overlaps with several other gates. *Id.* “If an expert’s methodology, reasoning, or foundation is unreliable, the evidence will not assist the trier of fact.” *Id.*

117. Judge Harvey Brown, *Eight Gates for Expert Witnesses*, 36 HOUS. L. REV. 743, 747, 757-72 (1999). Rule 702 requires that an expert witness be “qualified . . . by knowledge, skill, experience, training, or education.” TEX. R. EVID. 702. The level of knowl-

tive reliability,<sup>120</sup> foundational reliability,<sup>121</sup> reliance of inadmissible evidence used by other experts,<sup>122</sup> and Rule 403.<sup>123</sup> The substance of the gates overlap; they are not “neatly cabined cate-

edge, skill, experience, training, or education necessary has not been quantified. Judge Harvey Brown, *Eight Gates for Expert Witnesses*, 36 HOUS. L. REV. 743, 758 (1999). However, the expert must convince the court that he possesses sufficient, specialized knowledge to assist the jury. *Id.* That is, “A witness’s knowledge, skill, experience, training, or education must be separately examined for the precise opinion in question.” *Id.* at 763 (citing *Broders v. Heise*, 924 S.W.2d 148, 153 (Tex. 1996)).

118. Judge Harvey Brown, *Eight Gates for Expert Witnesses*, 36 HOUS. L. REV. 743, 747, 773-78 (1999). Relevancy is required of all evidence. TEX. R. EVID. 402. However, experts in federal court must meet the “fit” test articulated in *Daubert*. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 591 (1993). The expert’s testimony must be “sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute.” *Id.* (quoting *United States v. Downing*, 753 F.2d 1224, 1242 (3d Cir. 1985)). “*Daubert*’s fit prong requires a valid connection between scientific knowledge and the expert’s conclusion.” Judge Harvey Brown, *Eight Gates for Expert Witnesses*, 36 HOUS. L. REV. 743, 774 (1999). Texas courts have not adopted the “elevated fit test.” *Id.* at 777. In *Robinson*, the court held that the expert’s testimony “must be tied to the facts of the case—but the case did not explicitly adopt the fit language of either *Downing* or *Daubert*.” *Id.* (citing *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 556 (Tex. 1995)).

119. Judge Harvey Brown, *Eight Gates for Expert Witnesses*, 36 HOUS. L. REV. 743, 747-48, 778-804 (1999). At the methodological reliability gate, the judge examines the expert’s methodology, including the “neutrality or impartiality of the expert and the validity of the expert’s opinion.” *Id.* at 748. Rule 702 “permits expert testimony concerning ‘knowledge’ . . . To constitute scientific knowledge, the evidence must be ‘scientifically valid,’ must be ‘derived by the scientific method,’ must be ‘good science,’ must be ‘supported by appropriate validation,’ and must ‘rest on a reliable foundation.’” *Id.* at 780 (citing *Daubert*, 509 U.S. at 590, 593, 597).

120. Judge Harvey Brown, *Eight Gates for Expert Witnesses*, 36 HOUS. L. REV. 743, 749, 804-11 (1999). The “connective reliability” gate focuses on the expert’s reasoning. *Id.* at 749. The expert’s reasoning must be sound and demonstrated for the court to admit his opinion. *Id.*

121. *Id.* at 749, 811-75. To pass through the foundational reliability gate, an expert must show that his opinion has a reliable foundation. *Id.* at 749. This sixth gate requires the court to examine “the reliability of the underlying facts or data upon which the expert’s opinion is based.” Judge Harvey Brown, *Eight Gates for Expert Witnesses*, 36 HOUS. L. REV. 743, 749 (1999) (citing *Daubert*, 509 U.S. at 597).

122. *Id.* at 749-50, 875-79. This seventh gate requires an analysis of the proffered testimony under Rule 703. *Id.* at 749-50. Rule 703 permits an opinion based upon inadmissible evidence if it is “of a type reasonably relied upon by experts in the particular field.” TEX. R. EVID. 703.

123. Judge Harvey Brown, *Eight Gates for Expert Witnesses*, 36 HOUS. L. REV. 743, 750-51, 880-81 (1999). At the eighth and final gate, the court submits the expert’s testimony to a Rule 403 analysis. *Id.* at 749. This gate can block evidence that is unduly prejudicial or potentially misleading. TEX. R. EVID. 403. Rule 403 can also be “used to exclude multiple experts on the same topic.” Judge Harvey Brown, *Eight Gates for Expert Witnesses*, 36 HOUS. L. REV. 743, 750 (1999).

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gories.’”<sup>124</sup> However, “separately identifying the gates accents ‘the independent significance of each.’”<sup>125</sup>

While the proffered testimony of a gang expert must survive a court’s scrutiny at all eight gates,<sup>126</sup> the gates analyzing the reliability of the expert’s testimony, particularly the methodological and foundational reliability, pose significant barriers.<sup>127</sup> The reliability gates require the court to examine all aspects of the expert’s testimony to determine whether it “constitutes genuine knowledge in the expert’s field and is therefore trustworthy.”<sup>128</sup> Methodological reliability focuses on reliability of the expert’s methods.<sup>129</sup> For scientific evidence, *Daubert* suggests four factors designed to assess the methodological reliability of the proffered testimony.<sup>130</sup> *Kumho Tire Co. v. Carmichael*<sup>131</sup> instructs courts to examine the methodology of nonscientific experts using a flexible approach<sup>132</sup> that includes consideration of the *Daubert* factors.<sup>133</sup>

Other courts have also identified additional factors relevant at the methodological reliability gate. For example, an expert’s neutrality or impartiality should be examined.<sup>134</sup> Additionally, if the expert’s technique was developed solely for litigation purposes,

124. Judge Harvey Brown, *Eight Gates for Expert Witnesses*, 36 HOUS. L. REV. 743, 746 (1999) (quoting *Christophersen v. Allied-Signal Corp.*, 939 F.2d 1106, 1110 (5th Cir. 1991)).

125. *Id.* (quoting *Allied-Signal Corp.*, 939 F.2d at 1110).

126. *Id.* at 745.

127. *Id.* at 748.

128. *Id.*

129. Judge Harvey Brown, *Eight Gates for Expert Witnesses*, 36 HOUS. L. REV. 743, 748 (1999).

130. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 593-94 (1993). The four *Daubert* factors are: (1) whether the expert’s theory or technique “can be (and has been) tested”; (2) whether the theory or technique relied on by the expert “has been subjected to peer review and publication”; (3) a consideration of the technique’s “known or potential rate of error”; and (4) whether the theory or technique is generally accepted in the “relevant scientific community.” *Id.*; see also Judge Harvey Brown, *Eight Gates for Expert Witnesses*, 36 HOUS. L. REV. 743, 781-84 (1999) (recounting the four factors set forth in *Daubert*).

131. 526 U.S. 137 (1999).

132. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 158 (1999). The Court stated further that *Daubert* was not intended to be exhaustive or applicable in every case. *Id.*

133. *Id.* at 149-50.

134. See *Stachniak v. Hayes*, 989 F.2d 914, 924-25 (7th Cir. 1993) (concluding that an expert should be disqualified as a witness when the expert has an obvious bias); see also Judge Harvey Brown, *Eight Gates for Expert Witnesses*, 36 HOUS. L. REV. 743, 748 (1999) (stating that the court must examine the neutrality of the expert witness).



courts may question its general acceptance in the relevant scientific community.<sup>135</sup> Furthermore, the expert should be able to “recount a careful investigative process.”<sup>136</sup>

In Texas, the reliability and relevance requirements of *Daubert* apply to both scientific and nonscientific expert testimony.<sup>137</sup> Texas courts require that a nonscientific expert’s skill and experience reflect the relevance and reliability of his testimony in order for the testimony to pass through the methodological gate.<sup>138</sup> And, although “[r]eliability . . . does not . . . always require an examination of the *Daubert/Robinson* factors . . . the gatekeeping reliability requirement of *Daubert* applies to all experts.”<sup>139</sup>

Courts are also required to examine the foundational reliability of expert testimony.<sup>140</sup> *Daubert* acknowledged that expert testimony must have “a reliable foundation.”<sup>141</sup> “The foundational-reliability gate . . . focuses on the reliability of studies, articles, and data from others in the expert’s field and the assumptions of the expert.”<sup>142</sup> The expert’s testimony that the research is reliable is not enough.<sup>143</sup> Simply put, “[i]f the foundational data underlying

135. *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995).

136. Suzanne B. Baker, “*Gatekeeping*” in *Texas: The Practical Impact of Full Implementation of the Texas Rules of Civil Evidence Regarding Experts*, 27 ST. MARY’S L.J. 237, 269 (1996); Judge Harvey Brown, *Eight Gates for Expert Witnesses*, 36 HOUS. L. REV. 743, 791-92 (1999).

[L]ower courts have added other reliability factors, including the relationship of the expert’s technique to established methods, the availability of other experts to test and evaluate the technique, the expert’s qualifications, whether the expert reaches a conclusion first and then gathers support for the conclusion, whether an expert conducts selective research for the purpose of buttressing opinions, whether an expert fails to keep records or notes, whether the expert provides the actual data relied upon or merely purports to summarize it, and other relevant factors.

*Id.*

137. *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 726 (Tex. 1998) (applying *Daubert* to all expert testimony).

138. *Gammill*, 972 S.W.2d at 722.

139. Judge Harvey Brown, *Eight Gates for Expert Witnesses*, 36 HOUS. L. REV. 743, 803-04 (1999).

140. *Id.* at 823.

141. *Daubert v. Merrell Dow Pharms, Inc.*, 509 U.S. 579, 597 (1993).

142. Judge Harvey Brown, *Eight Gates for Expert Witnesses*, 36 HOUS. L. REV. 743, 821 (1999).

143. *Id.* at 814 (stating that “[r]eliability is not shown merely because an expert relies upon studies or research in support of his or her opinion or testifies that the data is reliable”); see also *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1316 (9th Cir. 1995) (expressing that an “expert’s bald assurance of validity is not enough”).

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opinion testimony are unreliable, an expert will not be permitted to base an opinion on that data because any opinion drawn from that data is likewise unreliable.”<sup>144</sup>

Typically, the gang expert’s testimony is lacking reliability, both methodological and foundational. First, because the information upon which the gang expert relies comes from highly unreliable sources, there is no credible data upon which the officer can base his opinion. Second, even though the available research indicates that individual gangs are often quite unique, gang experts across the country base their opinions on definitions and criteria that are strikingly similar.

### C. *The Need for Additional Research*

The research and available information regarding gangs, gang membership, and gang-related activity suffers from inaccurate reporting.<sup>145</sup> An overwhelming amount of information regarding gangs originates with two “highly suspect” groups of reporters—gang members and those who process the data, such as police officers and service providers.<sup>146</sup> The perspectives of these groups can sometimes be “self-serving and often unverifiable.”<sup>147</sup> Gang members, the primary data source for both law enforcement agencies and researchers, “tend to conceal and exaggerate and may in fact not know the scope of the gang’s activities.”<sup>148</sup> Law enforcement personnel and social service providers often respond to information from the media,<sup>149</sup> another notoriously unreliable source.<sup>150</sup>

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144. *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 714 (Tex. 1997).

145. Susan L. Burrell, *Gang Evidence: Issues for Criminal Defense*, 30 SANTA CLARA L. REV. 739, 746-47 (1990).

146. *General Introduction*, in *THE MODERN GANG READER* vii, ix (Malcolm W. Klein et al. eds., 1995).

147. *Id.*

148. Susan L. Burrell, *Gang Evidence: Issues for Criminal Defense*, 30 SANTA CLARA L. REV. 739, 773-74 n.164 (1990). Ms. Burrell’s review of the literature suggests that some commentators believe gang statistics are useless because “gang members lie to police with great regularity.” *Id.* at 747. Detective John Dyer stated in his affidavit that “[g]ang members will often admit their gang membership but due to recent high profile cases, admitted gang members are beginning to deny any gang affiliation.” *State v. Campos*, No. 99-CI-09648 (37th Dist. Ct., Bexar County, Tex. July 6, 1999).

149. Scott Decker & Kimberly Kempf-Leonard, *Constructing Gangs: The Social Definition of Youth Activities*, in *THE MODERN GANG READER* 14, 20 (Malcolm W. Klein et al. eds., 1995). Decker and Kempf-Leonard used a series of vignettes to test an individual’s knowledge regarding gang activity. *Id.* at 22. One vignette follows:

Consequently, “[t]here is no coherent, precise body of knowledge on gang behavior or gang activity to synthesize officers’ street experience.”<sup>151</sup> Funding formulas often tempt police departments and social service agencies to exaggerate gang activity.<sup>152</sup> Some police officers, and some entire departments, are simply corrupt.<sup>153</sup>

The most recent example of this corruption is the Rampart Scandal—“the worst scandal in the history of Los Angeles.”<sup>154</sup> The scandal involved widespread corruption within the Rampart Division’s CRASH Unit.<sup>155</sup> And, while the blame lies with the entire

*The Park:* A group of 20 to 30 sixteen-year-olds regularly hung out together at a neighborhood park. Many people in the neighborhood considered them a nuisance. These youths generally acted tough and talked tough. They often tried to recruit younger kids in the neighborhood to join them. The police were contacted to do something about the situation, so they sent a group of officers to the park. No drugs or guns were found during a round-up of these individuals, and no criminal charges were filed against them.

Would you classify this incident as gang-related?

YES \_\_\_\_\_ NO \_\_\_\_\_

*Id.*

150. See Susan L. Burrell, *Gang Evidence: Issues for Criminal Defense*, 30 SANTA CLARA L. REV. 739, 771-72 (1990) (listing the reasons why few reliable sources exist for information on gangs and also stating that the media has a tendency to exaggerate or sensationalize material on gangs); see also RAÚL DAMACIO TOVARES, *MANUFACTURING THE GANG: MEXICAN AMERICAN YOUTH GANGS ON LOCAL TELEVISION NEWS* 62 (2002). Tovares writes that “newswriters can cast a shooting, a fight, or a drug bust in a different frame, the gang frame, than [they] used to report crime in general. The gang frame taps into the viewers [sic] preconceptions, biases, and fears and simultaneously reinforces those preconceptions, biases, and fears.” *Id.* at 93-94.

151. Susan L. Burrell, *Gang Evidence: Issues for Criminal Defense*, 30 SANTA CLARA L. REV. 739, 771 (1990).

152. Robert J. Bursik, Jr. & Harold G. Grasmick, *Defining Gangs and Gang Behavior*, in *THE MODERN GANG READER* 8, 9 (Malcolm W. Klein et al. eds., 1995); see also Susan L. Burrell, *Gang Evidence: Issues for Criminal Defense*, 30 SANTA CLARA L. REV. 739, 747 (1990). Ms. Burrell writes: “[C]ase statistics are sometimes altered, simply to meet the needs of law enforcement.” *Id.* She also notes that a police chief in Southern California “was fired for allegedly presenting falsified statistics about the success of a gang prevention program which won his department state and national honors.” *Id.* at 774 n.164.

153. See David W. Burcham & Catherine L. Fisk, *The Rampart Scandal: Policing the Criminal Justice System, Introduction*, 34 LOY. L.A. L. REV. 537, 537 (2001) (discussing evidence of corruption in the Los Angeles police department and similar issues across the country).

154. Erwin Chemerinsky, *An Independent Analysis of the Los Angeles Police Department’s Board of Inquiry Report on the Rampart Scandal*, 34 LOY. L.A. L. REV. 545, 549 (2001).

155. CRASH is an acronym for *Community Response to Street Hoodlums*. Linda S. Beres & Thomas D. Griffith, *Demonizing Youth*, 34 LOY. L.A. L. REV. 747, 747 (2001).

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criminal justice system,<sup>156</sup> the “culture of war” promoted by the Los Angeles Police Department certainly anchored the actors who needed a base.<sup>157</sup>

Social science researchers, too, have contributed to the problem. In addition to the concern regarding unreliable data sources, researchers are plagued with outdated research tools and procedures.<sup>158</sup> In 1993, one group of commentators suggested that for the past fifteen years, “gang theory has been virtually stagnant.”<sup>159</sup>

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The *Loyola of Los Angeles Law Review* devoted a substantial portion of its Volume 34 to a discussion of the Rampart Scandal. Dean Burcham and Professor Fisk write in the Symposium’s Introduction:

The Rampart scandal has raised profound questions about the integrity of the Police Department and the entire criminal justice system in Los Angeles. Evidence shows that officers in the “anti-gang” unit of the LAPD’s Rampart Division framed innocent people for crimes they did not commit. Police officers planted evidence. They committed perjury to obtain convictions. They shot innocent suspects. They planted weapons on their shooting victims and claimed that the suspects attacked them.

David W. Burcham & Catherine L. Fisk, *The Rampart Scandal: Policing the Criminal Justice System*, 34 *LOY. L.A. L. REV.* 537, 537 (2001).

156. Symposium, *The Rampart Scandal: Policing the Criminal Justice System*, 34 *LOY. L.A. L. REV.* 537 (2001). The Rampart Scandal, arguably the worst scandal in Los Angeles history, dealt with improper police conduct. Erwin Chemerinsky, *An Independent Analysis of the Los Angeles Police Department’s Board of Inquiry Report on the Rampart Scandal*, 34 *LOY. L.A. L. REV.* 545, 549 (2001). Police officers in the Rampart Division CRASH unit framed innocent people by planting incriminating evidence and by committing perjury to obtain convictions against the accused. *Id.* Although the Board of Inquiry minimized the severity of the scandal, Rampart “far exceed[ed] police abuse.” *Id.* at 550. The Los Angeles County Supervisor noted that the scandal “is a dagger aimed at the heart of constitutional democracy.” *Id.* The Rampart scandal was recently resurrected by a new Police Chief, William Bratton. Bratton criticized the department’s internal review and “ordered an outside investigation, and newly reported testimony suggested that corrupt officers are still on the beat.” *LAPD Scandal Flares Up*, *GRAND RAPIDS PRESS*, Mar. 12, 2003, at A2, 2003 WL 4849729.

157. See Erwin Chemerinsky, *An Independent Analysis of the Los Angeles Police Department’s Board of Inquiry Report on the Rampart Scandal*, 34 *LOY. L.A. L. REV.* 545, 562-63 (2001). Professor Chemerinsky discusses the policing philosophy of the LAPD, known as “the Grip,” which focused on dominion and control. *Id.* He writes that the goal was “to completely control cops and all outside intruders, from the Police Commission and its Inspector General to the Justice Department to courts and prosecutors.” *Id.* at 564. The culture was a “‘confront, command and arrest’ . . . paramilitary style of policing. It relies on ‘command presence.’” *Id.* at 568. See generally Robert W. Benson, *Changing Police Culture: The Sine Qua Non of Reform*, 34 *LOY. L.A. L. REV.* 681 (2001) (calling for a reform of police culture).

158. *General Introduction*, in *THE MODERN GANG READER* vii, ix (Malcolm W. Klein et al. eds., 1995).

159. Finn-Aage Esbensen et al., *Gang and Non-gang Youth: Differences in Explanatory Factors*, in *THE MODERN GANG READER* 192, 193 (Malcolm W. Klein et al. eds.,

Consequently, gang experts and other law enforcement personnel have little credible information to work with. This unreliable data has resulted in a massive over-reporting of gangs members and their activities, followed by panic, and then countered with a military-style response, such as “The War on Drugs” or “The War on Gangs.”<sup>160</sup>

These crusades are taking too many prisoners and leaving a disproportionate effect on minority communities.<sup>161</sup> In Orange County California, the minority population is less than 50%, yet 90% of the names listed on the county’s gang database are Latino, Black, or Asian.<sup>162</sup> Latinos make up only 27% of the county’s population, but 73% of the names in the gang database are Latino.<sup>163</sup> Similarly, in Los Angeles County, 47% of all Black men between the ages of twenty-one and twenty-four are documented gang members.<sup>164</sup> In Denver, the gang database includes two-thirds of the young Black men in the city.<sup>165</sup> These disproportionate statistics raise issues regarding the reliability of the methods used by law enforcement agencies to identify gang members.

1995); *see also* Cheryl L. Maxon & Malcolm W. Klein, *Street Gang Violence: Twice as Great or Half as Great*, in *THE MODERN GANG READER* 24, 24 (Malcolm W. Klein et al. eds., 1995) (suggesting that significant changes in the structure and activity of street gangs has “taken place since the decades of the 1950s and 1960s, when much of our gang knowledge was gathered”).

160. Linda S. Beres & Thomas D. Griffith, *Demonizing Youth*, 34 *LOY. L.A. L. REV.* 747, 747-48 (2001) (writing that conceptualizing efforts to control crime in military terms “encourage[s] an ‘ends justifies the means’ attitude”).

161. Erwin Chemerinsky, *An Independent Analysis of the Los Angeles Police Department’s Board of Inquiry Report on the Rampart Scandal*, 34 *LOY. L.A. L. REV.* 545, 564 (2001). “Rampart officers came to see Latino and African American men between fifteen and fifty who had short hair and baggy pants as gang members and felt that any efforts to remove them from the streets, including by planting evidence, were warranted.” *Id.* Former Interim Chief of Police Bayan Lewis stated that “‘we were hunters, hunter killers. . . . [Gates] created an occupational army, the Hammer, anti-gang task forces, sweeps in which [we would] arrest 1000 people. . . . Few of them were ever charged, but it was effective. By God, if you even look[ed] like a gang member, [you were] going to jail.’” *Id.* at 568-69.

162. Nina Siegal, *Ganging Up on Civil Liberties*, *THE PROGRESSIVE*, Oct. 1, 1997, at 28, 1997 WL 8972589.

163. *Id.*

164. *Id.* Even the Los Angeles County District Attorney expressed concern: “‘That number is so far out of line . . . that a careful, professional examination is needed to determine whether police procedure may be systematically over-identifying black youths as gang members.’” *Id.*

165. Linda S. Beres & Thomas D. Griffith, *Demonizing Youth*, 34 *LOY. L.A. L. REV.* 747, 762 n.58 (2001).

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Another factor affecting the reliability of the gang expert's testimony is the reciprocal reliance among law enforcement agencies across the country to develop criteria for identifying gang members. By relying on other law enforcement agencies' criteria for identifying gang members, research indicating that individual gangs can be, and often are, quite unique has been ignored.<sup>166</sup> Researchers have described and explained the different structures of individual gangs.<sup>167</sup> The structure of a gang might be a function of its geographic location.<sup>168</sup> For instance, gangs in San Antonio are less organized and tend to be more violent.<sup>169</sup> The gang's unique structuring may relate to the gang's primary activity,<sup>170</sup> size, age, or sex of its members.<sup>171</sup> For example, female gangs operate within their own unique structure,<sup>172</sup> as do ethnic gangs.<sup>173</sup> Cultural gangs are

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166. Cheryl Renee Rosier, *Former Gang Members' Experiences of Getting in and Getting out of a Gang: A Phenomenological Study* 118 (1998) (unpublished Ph.D. dissertation, St. Mary's University) (on file with the St. Mary's University, Louis J. Blume Library).

167. See MARTIN SANCHEZ JANKOWSKI, *ISLANDS IN THE STREET: GANGS AND URBAN AMERICAN SOCIETY* 89-100 (1991) (describing several different models of gang organization based primarily on the type of leadership the individual gang has chosen).

168. See Cheryl Renee Rosier, *Former Gang Members' Experiences of Getting in and Getting out of a Gang: A Phenomenological Study* 28-33, 79 (1998) (unpublished Ph.D. dissertation, St. Mary's University) (on file with the St. Mary's University, Louis J. Blume Library) (discussing gangs in Texas, Chicago, Los Angeles, New York City, Omaha, St. Louis, and San Diego).

169. Cheryl Renee Rosier, *Former Gang Members' Experiences of Getting in and Getting out of a Gang: A Phenomenological Study* 80, 119-20 (1998) (unpublished Ph.D. dissertation, St. Mary's University) (on file with the St. Mary's University, Louis J. Blume Library).

170. Cheryl Renee Rosier, *Former Gang Members' Experiences of Getting in and Getting out of a Gang: A Phenomenological Study* 51-54 (1998) (unpublished Ph.D. dissertation, St. Mary's University) (on file with the St. Mary's University, Louis J. Blume Library). A gang that engages in drug related activities, for example, may have a different structure than a gang focusing on economic crimes. *Id.* at 51.

171. *Id.* at 53.

172. See generally Anne Campbell, *Female Participation in Gangs*, in *THE MODERN GANG READER* 70, 70-75 (Malcolm W. Klein et al. eds., 1995) (explaining the unique characteristics of female gangs); GINI SIKES, *8 BALL CHICKS* xxii-xxv (1997).

173. Jerome H. Skolnick, *Gangs and Crime Old as Time; But Drugs Change Gang Culture*, in *THE MODERN GANG READER* 222, 223 (Malcolm W. Klein et al. eds., 1995). Skolnick writes that in Los Angeles

[f]amily and community ties are most apparent among Chicano gangs. Such ties are sometimes traceable through several generations. The newer black gangs, while they observe similar conventions of respect, loyalty, and brotherhood, do not have the stability and historic roots of the Chicano gangs. And although black gangs identify with

evolving toward an entrepreneurial model,<sup>174</sup> and more affluent gangs are appearing in rural areas and in the suburbs.<sup>175</sup> Yet, most agencies across the country still identify gang members using a set of criteria introduced by the California Youth Gang Task Force in 1988.<sup>176</sup> These factors include:

- (1) Subject admits being a member of a gang[;]
- (2) [s]ubject has tattoos, clothing, etc., that are only associated with certain gangs[;]
- (3) [s]ubject has been arrested while participating in activities with a known gang member[;]
- (4) [i]nformation that places the subject with a gang has been obtained from a reliable informant[; and]
- (5) [c]lose association with known gang members has been confirmed.<sup>177</sup>

Other law enforcement agencies, including the San Antonio Police Department,<sup>178</sup> have cloned the California Task Force's criteria.<sup>179</sup>

Identifying members of different gangs with unique structures is a challenging task for law enforcement agencies, especially as new types of gangs emerge. Nevertheless, it is critical that agencies develop criteria that accurately identifies gang members. Otherwise,

neighborhoods, they do not seem to command the solidarity and traditional values of local Chicano neighborhood gangs.

*Id.*; see also Ko-Lin Chin, *Chinese Gangs and Extortion*, in *THE MODERN GANG READER* 46, 46 (Malcolm W. Klein et al. eds., 1995) (detailing the hallmarks of Chinese gangs); James Diego Vigil, *Barrio Gangs: Street Life and Identity in Southern California*, in *THE MODERN GANG READER* 125, 125 (Malcolm W. Klein et al. eds., 1995) (addressing the complexities of Southern California Chicano street gangs).

174. See generally Jerome H. Skolnick, *Gangs and Crime Old as Time; But Drugs Change Gang Culture*, in *THE MODERN GANG READER* 222, 223 (Malcolm W. Klein et al. eds., 1995) (describing the shifting role of the gang from cultural to entrepreneurial).

175. Cheryl Renee Rosier, *Former Gang Members' Experiences of Getting in and Getting out of a Gang: A Phenomenological Study* 61 (1998) (unpublished Ph.D. dissertation, St. Mary's University) (on file with the St. Mary's University, Louis J. Blume Library).

176. Jeffrey J. Mayer, *Individual Moral Responsibility and the Criminalization of Youth Gangs*, 28 *WAKE FOREST L. REV.* 943, 965-66 & n.126 (1993).

177. *Id.* at 966.

178. Interview with John Dyer, Detective, San Antonio Police Department, San Antonio, Tex. (Mar. 13, 2002). Detective Dyer indicated that the San Antonio Police Department's criteria were patterned after the criteria developed in California. *Id.*

179. See Jeffrey J. Mayer, *Individual Moral Responsibility and the Criminalization of Youth Gangs*, 28 *WAKE FOREST L. REV.* 943, 969-74 (1993) (outlining the criteria used by law enforcement agencies in San Diego, Kansas City, and Portland).

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the gang expert's testimony will lack the methodological and foundational reliability courts require for its admissibility. Any time an expert testifies, no matter the method used or reason why, the testimony of the expert must survive a reliability analysis. In other words, failure to develop criteria which accurately identifies gang members has jeopardized the gang expert's reliability, and thus, his ability to testify.

#### D. *The Criteria*

In San Antonio, a gang expert's testimony regarding gang membership does not survive the test of reliability articulated by Texas courts. Of the six allegedly "strict criteria" adopted by the San Antonio Police Department's Youth Crime Detail,<sup>180</sup> none are based entirely on objective determinations. In fact, only one of the criteria can be construed as substantially based on objective determinations.

##### 1. Subject Admits to Being a Gang Member

Nationwide gang task forces use the first of the six criteria, a subject admits being a member of a gang, almost universally.<sup>181</sup> Naturally, law enforcement personnel consider this criterion a very strong indication of gang membership.<sup>182</sup> Yet, even the police understand quite well that "the concept of [gang] 'membership' is elusive."<sup>183</sup> For a gang expert's testimony regarding an individual's membership in a particular gang to survive an objection based on reliability, the expert must possess accurate information regarding

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180. See *State v. Campos*, No. 99-CI-09648 (37th Dist. Ct., Bexar County, Tex. July 6, 1999) (referring to the criteria used to identify gang members by the Austin Police Department).

181. See Cheryl L. Maxon & Malcolm W. Klein, *Street Gang Violence: Twice as Great or Half as Great*, in *THE MODERN GANG READER* 24, 25 (Malcolm W. Klein et al. eds., 1995) (identifying gang members by several criteria, including an admission of being a gang member); Linda S. Beres & Thomas D. Griffith, *Demonizing Youth*, 34 *LOY. L.A. L. REV.* 747, 761 (2001) (indicating that professing to be a gang member is one of the criteria for placement on a gang list); see also Jeffrey J. Mayer, *Individual Moral Responsibility and the Criminalization of Youth Gangs*, 28 *WAKE FOREST L. REV.* 943, 969-74 (1993) (detailing the criteria used by different police departments).

182. Interview with John Dyer, Detective, San Antonio Police Department, San Antonio, Tex. (Mar. 13, 2002). Detective Dyer stated that if individuals claim affiliation with a gang, they will be treated as a gang member. *Id.*

183. Susan L. Burrell, *Gang Evidence: Issues for Criminal Defense*, 30 *SANTA CLARA L. REV.* 739, 750 (1990) (noting that there are different levels of gang membership).



the existence of a gang and the defendant's membership in that gang. Evidence of a gang's existence and of an individual's membership in that gang is often "based on law enforcement guesswork."<sup>184</sup> If guesswork is used, the testimony is not reliable and therefore, it is inadmissible.

a. Existence of a Criminal Street Gang

There is no generally accepted definition of a criminal street gang. Definitions differ "according to the perceptions and interests of the definer, academic fashions, and the changing social reality of the gang."<sup>185</sup> However, researchers generally agree that the definition is "difficult and arbitrary."<sup>186</sup> Most commonly used definitions have evolved from Frederick Thrasher's 1927 profile of a street gang. Thrasher defined "street gang" as being "an interstitial group originally formed spontaneously, and then integrated through conflict . . . . The result of this collective behavior is the development of tradition, unreflective internal structure, *esprit de corps*, solidarity, morale, group awareness, and attachment to a local territory."<sup>187</sup> In 1971, noted gang researcher Malcolm Klein suggested a definition that became widely adopted:

[A]ny identifiable group of youngsters who (a) are generally perceived as a distinct aggregation by others in their neighborhood, (b) recognize themselves as a denotable group (almost invariably with a group name), and (c) have been involved in a sufficient number of delinquent incidents to call forth a consistent negative response from neighborhood residents and/or law enforcement agencies.<sup>188</sup>

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184. *Id.* at 751. Burrell writes: "The primary reason for inaccuracy is definitional—there is no agreement on what gangs are or how to determine gang membership." *Id.* at 748.

185. *Id.* at 749 (citation omitted).

186. Malcolm W. Klein & Cheryl L. Maxson, *Street Gang Violence*, in *VIOLENT CRIME, VIOLENT CRIMINALS* 198, 205 (Neil A. Weiner & Marvin E. Wolfgang eds., 1989); see also Robert J. Bursik & Harold G. Grasmick, *Defining Gangs and Gang Behavior*, in *THE MODERN GANG READER* 8, 8 (Malcolm W. Klein et al. eds., 1995) (defining how a gang should be defined based on gang members' behavior and society's response to that behavior).

187. FREDERIC M. THRASHER, *THE GANG: A STUDY OF 1,313 GANGS IN CHICAGO* 5, 57 (1937).

188. Robert J. Bursik, Jr. & Harold G. Grasmick, *Defining Gangs and Gang Behavior*, in *THE MODERN GANG READER* 8, 8 (Malcolm W. Klein et al. eds., 1995).

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Colleagues note that more than a few fraternities would be branded as street gangs under Klein's definition.<sup>189</sup>

In 1980, Walter Miller reported the results of a survey indicating that:

[A] youth gang is a self-formed association of peers, bound together by mutual interests, with identifiable leadership, well-developed lines of authority, and other organizational features, who act in concert to achieve a specific purpose or purposes, which generally include the conduct of illegal activity and control over a particular territory, facility, or type of enterprise.<sup>190</sup>

Miller based his definition "on the responses of 309 respondents representing 121 youth serving agencies in 26 areas of the country . . . including police officers, prosecutors, defenders, educators, city council members, state legislators, ex-prisoners, and past and present members of gangs and groups."<sup>191</sup>

One commentator nominated what he called

a publicly accepted definition of a gang:

Uniformly ethnic, often Black or Hispanic, males united by strong social ties;

[o]rganized principally for a criminal purpose; and

[a]lthough lacking a philosophy or guiding purpose other than criminal activities, manifesting some outward sign of group consciousness such as hand signs or clothing.<sup>192</sup>

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189. *See id.* The authors suggest that campus fraternities would meet the first two conditions of being a gang because "each has a unique name, and highly visible, relatively arcane symbols (i.e., Greek letters) are used to signify membership in such groups," and that most college campuses embraced at least one fraternity that met the third condition, that is, "had a 'dangerous' reputation on campus." *Id.*

190. *Id.* at 11.

191. Robert J. Bursik, Jr. & Harold G. Grasmick, *Defining Gangs and Gang Behavior*, in *THE MODERN GANG READER* 8, 11 (Malcolm W. Klein et al. eds., 1995). Miller's survey asked people to respond to the question: "What is your conception of a gang? Exactly how would you define it?" *Id.* He provided 1,400 characteristics, and 85% of the respondents agreed on six. *Id.* Miller's approach has been criticized by commentators as more of a "vote." *Id.* Nevertheless, Miller's definition helped form "the basis for different policies, laws, and strategies." *Id.* at 11 (noting that "[o]ne of the most interesting attempts to produce a definition with a broad consensual base is that of Walter Miller").

192. *See* Jeffrey J. Mayer, *Individual Moral Responsibility and the Criminalization of Youth Gangs*, 28 *WAKE FOREST L. REV.* 943, 952 (1993) (citing James B. Sibley, *Gang Violence: A Response of the Criminal Justice System to the Growing Threat*, 11 *CRIM. JUST. J.* 403, 404-04 n.12 (1989)).

Most definitions appear to include several concepts. At a minimum, the word “gang” describes a group of young people who are identifiable and have common interests, including regular or consistent criminal activities. The concerns with a definition like this are two-fold. First, the definition does not sufficiently distinguish between a criminal street gang and other youth groups with different social, or perhaps even legal, purposes.<sup>193</sup> A street gang is analogous to an organized baseball or basketball team as opposed to a group that regularly gets together to play pick-up games.<sup>194</sup> “One person’s gang may be another’s peer group, street-corner group, crowd, clique, hanging group, club or simply youth group.”<sup>195</sup> Skinheads are not commonly thought of as street gangs because they lack “a common street corner or neighborhood culture” generally thought to be required for classification as a gang.<sup>196</sup> A group of young persons who participate in a drug-dealing network or crew is not necessarily a street gang.<sup>197</sup> Similarly, a “tagger

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193. *Id.* at 954 (noting that “[a]bsent compelling evidence, social relationships should not be a presumed cover for criminal purpose”). Mayer writes:

Gangs become a social problem only when youths engage in organized criminal or socially unacceptable activity. The informal organization of youths into groups is neither necessarily improper nor preventable. If social ties are independent of the criminal ties or, even if the two overlap, if the criminal activities play only a minor role in social actions driven by social ties, gangs are not . . . social problem[s].

*Id.* at 953-54 (citation omitted).

194. See Robert J. Bursik, Jr. & Harold G. Grasmick, *Defining Gangs and Gang Behavior*, in THE MODERN GANG READER 8, 8 (Malcolm W. Klein et al. eds., 1995) (comparing benign group activities, such as regularly played sporting activities, in the categorization of a gang under the generic definition of a “gang”).

195. See Scott Decker & Kimberly Kempf-Leonard, *Constructing Gangs: The Social Definition of Youth Activities*, in THE MODERN GANG READER 14, 15 (Malcolm W. Klein et al. eds., 1995) (quoting J.W.C. Johnstone, *Youth Gangs and Black Suburbs*, 24 PAC. SOC. REV. 355, 355 (1981)). Daniela’s story is illustrative: “We were a group of girls in high school. People called us (gang name) so we decided to turn into a gang.” Cheryl Renee Rosier, *Former Gang Members’ Experiences of Getting in and Getting out of a Gang: A Phenomenological Study* 82 (1998) (unpublished Ph.D. dissertation, St. Mary’s University) (on file with the St. Mary’s University, Louis J. Blume Library).

196. Mark S. Hamm, *The Differences Between Street Gangs and Neo-Nazi Skinheads*, in THE MODERN GANG READER 62, 64 (Malcolm W. Klein et al. eds., 1995).

197. Felix Padilla, *The Working Gang*, in THE MODERN GANG READER 53, 53 (Malcolm W. Klein et al. eds., 1995).

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crew,” which is a group of youths whose organizing purpose is graffiti, may not always fall under the “gang” categorization.<sup>198</sup>

Second, the generic definition of a street gang does not adequately isolate the type, level, or frequency of the criminal activity that would serve to classify a group of young people as a street gang.<sup>199</sup> As such, a group of four or five thirteen year-olds who adopt a common name and occasionally shoplift or skip school together is not a gang, despite the potential applicability of the generic definition.<sup>200</sup>

The definition of a criminal street gang used by law enforcement agencies in Texas is helpful to understand what groups constitute a criminal street gang. A criminal street gang is subject to injunctions based on public nuisance.<sup>201</sup> Such a “criminal street gang” is “three or more persons having a common identifying sign or symbol or an identifiable leadership who continuously or regularly associate in the commission of criminal activities.”<sup>202</sup> Although this definition exposes Texans to some of the abuse documented in other areas of the country, there is no evidence that Texas law enforcement agencies have attempted to stretch the definition unreasonably. To the contrary, the affidavit of Detective John Dyer in *State v. Campos*,<sup>203</sup> notwithstanding its boilerplate nature, appears to accurately document the existence of the Klick and Klan and identify them as criminal street gangs.<sup>204</sup> However, it is more difficult to reliably identify individuals as members of particular gangs.

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198. See Wayne S. Wooden, *Tagger Crews and Members of the Posse*, in *THE MODERN GANG READER* 65, 65 (Malcolm W. Klein et al. eds., 1995) (discussing the motivation for tagging as well as the differences between tagging and gang affiliation).

199. See generally Jeffrey J. Mayer, *Individual Moral Responsibility and the Criminalization of Youth Gangs*, 28 *WAKE FOREST L. REV.* 943 (1993) (arguing that current youth gang characteristics are misdirected and ineffective in addressing youth violence and that individual moral responsibility is where the focus ought to be).

200. See Robert J. Bursik, Jr. & Harold G. Grasmick, *Defining Gangs and Gang Behavior*, in *THE MODERN GANG READER* 8, 11 (Malcolm W. Klein et al. eds., 1995) (stating that “all childhood play groups represent potential forms of gangs”).

201. *TEX. CIV. PRAC. & REM. CODE ANN.* § 125.062 (Vernon 1997).

202. *TEX. PEN. CODE ANN.* § 71.01(d) (Vernon Supp. 2003).

203. No. 99-CI-09648 (37th Dist. Ct., Bexar County, Tex. July 6, 1999).

204. See *State v. Campos*, No. 99-CI-09648 (37th Dist. Ct., Bexar County, Tex. July 6, 1999) (referring to Detective John Dyer’s affidavit).

b. Subject is a Member of a Gang

The identification of individuals as members of particular gangs encompasses three major problems. First, the identification criteria do not account for the several levels of gang membership, some of which do not involve criminal activity. Second, the procedure for keeping and purging the gang databases and other lists does not account for the fluid nature of gang membership. Finally, there is strong evidence that nongang members identify themselves as gang members for legitimate reasons.

Gang databases do not adequately distinguish between core members and those who exist on the fringe of gangs.<sup>205</sup> A vast majority of gangs have numerous levels of membership.<sup>206</sup> Usually, only the “hard-core” members participate in serious criminal activity.<sup>207</sup> Others exist on the fringe, and these nonhard-core

205. See Susan L. Burrell, *Gang Evidence: Issues for Criminal Defense*, 30 SANTA CLARA L. REV. 739, 750 (1990) (indicating gang membership is elusive and loosely structured).

206. Ice T, *The Killing Fields*, in THE MODERN GANG READER 147, 147 (Malcolm W. Klein et al. eds., 1995); Operation Safe Streets (OSS) Street Gang Detail, *L.A. Style: A Street Gang Manual of the Los Angeles County Sheriff's Department*, in THE MODERN GANG READER 34, 37 (Malcolm W. Klein et al. eds., 1995); Terence B. Thornberry et al., *The Role of Juvenile Gangs in Facilitating Delinquent Behavior*, in THE MODERN GANG READER 174, 178 (Malcolm W. Klein et al. eds., 1995); Susan L. Burrell, *Gang Evidence: Issues for Criminal Defense*, 30 SANTA CLARA L. REV. 739, 750 (1990); Suzin Kim, Note, *Gangs and Law Enforcement: The Necessity of Limiting the Use of Gang Profiles*, 5 B.U. PUB. INT. L.J. 265, 268-69 (1996); Matthew Mickle Werdegar, Note, *Enjoining the Constitution: The Use of Public Nuisance Abatement Injunctions Against Urban Street Gangs*, 51 STAN. L. REV. 409, 424 (1999). Burrell quotes a report written by California's Attorney General:

The generally recognized levels of membership include “hardcore” members, who are “those few who need and thrive on the totality of gang activity.” The hardcore are composed of the leadership and inner circle of active gang activity . . . . At the mid-level of involvement are the “associates,” who “associate with the group for status and recognition.” They may wear club jackets, attend social functions, and may have tattoos. Their association fulfills the need of belonging. At the low end of membership are the “peripherals” or “fringe members” who are even more tangentially related to the group. The peripherals “move ‘in and out’ on the basis of interest in the activity or activities.”

Susan L. Burrell, *Gang Evidence: Issues for Criminal Defense*, 30 SANTA CLARA L. REV. 739, 750 n.45 (1990); see also JUVENILE CRIME INTERVENTION, OFFICE OF THE ATT'Y GEN., GANGS IN TEXAS: 2001, at 6 (2002) (noting that the common levels of involvement are “regulars,” “hard-core,” “associates,” and “juniors”).

207. WILLIAM B. SANDERS, GANGBANGS AND DRIVE-BYS, GROUNDED CULTURE AND JUVENILE GANG VIOLENCE 172 (1994).

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members rarely participate in gang violence.<sup>208</sup> Distinguishing between levels of membership within the same gang is imperative since gang membership status is linked to the severity of crime committed by a particular member.

Gang databases also cannot ascertain gangs that have dissolved or gang members who have moved on for one reason or another. Gang “[m]embership stability . . . is relatively low.”<sup>209</sup> Some individuals only associate with a gang for a brief period.<sup>210</sup> And, even though their names are located in gang databases, few are involved in delinquent activity when they are not associated with a gang.<sup>211</sup>

Finally, there are many legitimate reasons why a young person would self-identify as a member of a street gang. A common reason appears to be survival; gangs are notorious for effective intimidation techniques.<sup>212</sup> “Young males may have to make peace with local gangs to go to school, work, or merely walk around the neighborhood,”<sup>213</sup> and some nongang members would “rather blend in”

208. *Id.* at 13-14. “Much of what gangs do is non-criminal. Many gang members spend most of their gang-time ‘hanging out’ and ‘kicking back.’” JUVENILE CRIME INTERVENTION, OFFICE OF THE ATT’Y GEN., GANGS IN TEXAS: 2001, at 1 (2002).

209. Malcolm W. Klein & Lois Y. Crawford, *Groups, Gangs, and Cohesiveness*, in THE MODERN GANG READER 160, 161 (Malcolm W. Klein et al. eds., 1995).

210. Terence B. Thornberry et al., *The Role of Juvenile Gangs in Facilitating Delinquent Behavior*, in THE MODERN GANG READER 174, 178 (Malcolm W. Klein et al. eds., 1995); see also Malcolm W. Klein & Lois Y. Crawford, *Groups, Gangs, and Cohesiveness*, in THE MODERN GANG READER 160, 161 (Malcolm W. Klein et al. eds., 1995) (observing that “large groups in which the combined subgroup memberships have totaled more than two hundred over a two- to three-year period, yet at any given point of time there may be only thirty or forty active members. . . . [T]urnover is high”).

211. Terence B. Thornberry et al., *The Role of Juvenile Gangs in Facilitating Delinquent Behavior*, in THE MODERN GANG READER 174, 181 (Malcolm W. Klein et al. eds., 1995).

212. See Susan L. Buitell, *Gang Evidence: Issues for Criminal Defense*, 30 SANTA CLARA L. REV. 739, 750 (1990) (reporting that youths may be forced to join gangs).

213. Jeffrey J. Mayer, *Individual Moral Responsibility and the Criminalization of Youth Gangs*, 28 WAKE FOREST L. REV. 943, 961 (1993); see also Ice T, *The Killing Fields*, in THE MODERN GANG READER 147, 149 (Malcolm W. Klein et al. eds., 1995). “When you live on a certain street, you will always be held accountable for your ‘hood if something goes down . . . . [A] totally square kid living on 83rd Street knows his street is a Crip street and knows he can’t avoid the politics of his ‘hood.” *Id.* at 149; see also Matthew Mickle Werdegar, Note, *Enjoining the Constitution: The Use of Public Nuisance Abatement Injunctions Against Urban Street Gangs*, 51 STAN. L. REV. 409, 412, 423 n.86 (1999). “[Y]ouths in gang-dominated neighborhoods will frequently claim to be gang members even when they are not . . . . [They] fear . . . angering gang-member friends and . . . desire to claim the respect they believe comes with gang membership.” *Id.*

than fight it.<sup>214</sup>

## 2. A Reliable Person Identifies the Subject as a Gang Member

The second criterion, identification of a gang member by a reliable person, may also lead to inaccurate classifications. First, assuming that the expert has accurately identified an existing gang, the informant, no matter how capable and reputable, still must rely on information from the reputed gang members themselves. Thus, this information is subject to many of the same concerns as when a person self-identifies as a gang member.<sup>215</sup> Additionally, allowing a police officer to determine the reliability of an informant, without any guidance, exposes the process to potential abuse.<sup>216</sup>

## 3. A Person of Untested Reliability Identifies the Subject As a Gang Member and It Is Corroborated by Independent Information

The third criterion, relying on an untested informant if the informant identification is independently corroborated, further exposes the process to unreliable opinions. Again, as with the first two criteria, the overwhelming majority of the information regarding gang membership originates from an extremely unreliable source—the alleged gang members. Additionally, there is no presumption of accuracy attached to information obtained from an untested informant. The corroboration of this questionable identification process without specified independent evidence does little to increase its reliability.

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214. Ice T, *The Killing Fields*, in *THE MODERN GANG READER* 147, 149 (Malcolm W. Klein et al. eds., 1995).

215. Suzin Kim, Note, *Gangs and Law Enforcement: The Necessity of Limiting the Use of Gang Profiles*, 5 *B.U. PUB. INT. L.J.* 265, 272 (1996).

216. Linda S. Beres & Thomas D. Griffith, *Demonizing Youth*, 34 *LOY. L.A. L. REV.* 747, 761 (2001). The criteria associated with several databases provide some guidance for judging the reliability of informants. *Id.* The analogous factor associated with the California database CAL/GANG presumes that teachers and parents are reliable. *Id.* The criteria reads that a suspected gang member “[i]s deemed a gang member by a reliable source, such as a trusted informant, teacher, or parent.” *Id.*; see also *FLA. STAT. ANN.* § 874.03(2) (West Supp. 1993) (requiring the information regarding gang membership come from a documented, reliable informant).

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## 4. An Individual Resides in or Frequents a Particular Gang's Area and Affects His Style of Dress, Use of Hand Signs, Symbols or Tattoos and Associates or Is Photographed with Known Gang Members

In more recent injunctions filed by the San Antonio District Attorney's Office, the fourth criterion has been merged with the fifth criterion.<sup>217</sup> Apparently, the merger addressed some repetition in the two criteria.<sup>218</sup> Additionally, some information law enforcement agencies that previously relied upon to identify gang members has been eliminated. Specifically, an individual's residence within a gang area is no longer relevant to his identification as a gang member.<sup>219</sup> Certainly, a person who lives in a "gang area" will probably be seen there frequently. The over-inclusiveness of this factor is obvious, as is the potential for abuse at the hands of law enforcement personnel. Arguably, almost every person living within a target area has met one or more criteria and may be exposed to identification as a member of a criminal street gang.

## 5. An Individual Has Tattoos, Wears or Possesses Clothing and/or Other Paraphernalia That Is Only Associated with a Specific Gang

Identification as a street gang member based on clothing, colors, or tattoos, is unreliable. While clothing may reflect the collective identity of a street gang,<sup>220</sup> it is more likely to indicate an individual's preference.<sup>221</sup> Young people often dress alike, particularly if

217. See TEX. CODE CRIM. PROC. ANN. art. 61.02(c)(2)(D) (Vernon 2002) (tracking the fourth criteria). "[E]vidence that the individual frequents a documented area of a criminal street gang, associates with known criminal street gang members, and uses criminal street gang dress, hand signals, tattoos, or symbols." *Id.*

218. *Id.* (combining criteria four and five in article 61.02(c)(2)(D)).

219. *Id.* art. 61.02(c)(2). Yet, at least up until July 6, 1999, the San Antonio Police Department used a person's residence as a factor in identifying the person as a gang member. *State v. Campos*, No. 99-CI-09648 (37th Dist. Ct., Bexar County, Tex. July 6, 1999).

220. MARTIN SANCHEZ JANKOWSKI, *ISLANDS IN THE STREET: GANGS AND URBAN AMERICAN SOCIETY* 84 (1991) (noting that a gang's primary objective is to establish a collective identity, usually accomplished by their clothing).

221. See Nina Siegal, *Ganging Up on Civil Liberties*, THE PROGRESSIVE, Oct. 1, 1997, at 28, 1997 WL 8972589. Ms. Siegal relates the story of Miguel Moreno, a fan of the Oakland Raiders football team. Mr. Moreno testified in court:

I was stopped by a policeman when I was walking down the street . . . I was wearing a shirt and a cap with RAIDERS on them, and the police officer told me that Raiders clothes were gang clothes. I was only wearing [them] because I am a Raiders fan, and



the style rejects authority.<sup>222</sup> The gang look has frequently become stylish as nongang members adopt the “dress, mannerisms, and behavior of hard-core street gangs.”<sup>223</sup> The tendency of gangs to adopt designer clothing or clothes associated with popular sports teams makes it more difficult to distinguish gang members from other young people.<sup>224</sup> Finally, the more sophisticated gangs, especially those gangs engaged in entrepreneurial activities, will often hide their association with a particular gang and not show gang colors or wear clothes identified with a gang.<sup>225</sup> Thus, law enforcement officials cannot accurately identify gang members based on their clothes or colors, without more.

Tattoos are also an unreliable identification tool. Many former gang members have tattoos.<sup>226</sup> “Retired gang members bear the tattoos of their active days, whether they want to or not.”<sup>227</sup> Moreover, tattoos are popular, especially with some minority communities.<sup>228</sup>

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that is what I told the officer. The policeman took my picture without asking me, and said it was for his “collection.”

*Id.*

222. Susan L. Burrell, *Gang Evidence: Issues for Criminal Defense*, 30 SANTA CLARA L. REV. 739, 754 n.64 (1990).

223. *Id.*; see also Robert J. Bursik, Jr. & Harold G. Grasmick, *Defining Gangs and Gang Behavior*, in THE MODERN GANG READER 8, 10 (Malcolm W. Klein et al. eds., 1995). Once particular symbols (such as certain forms of dress or graffiti) became associated with gang membership, they quickly “became adopted by many nongang adolescents as a sign of personal rebellion.” *Id.*

224. *Id.*

225. See Jerome H. Skolnick, *Gangs and Crime Old as Time; But Drugs Change Gang Culture*, in THE MODERN GANG READER 222, 226 (Malcolm W. Klein et al. eds., 1995). Accordingly, gang dealers avoid, switch, or wear neutral colors when transacting drug deals. *Id.*

226. Susan L. Burrell, *Gang Evidence: Issues for Criminal Defense*, 30 SANTA CLARA L. REV. 739, 755 n.65 (1990); Kim Strosnider, *Anti-Gang Ordinances After City of Chicago v. Morales: The Intersection of Race, Vagueness Doctrine, and Equal Protection in the Criminal Law*, 39 AM. CRIM. L. REV. 101, 115-31, 279 (2002).

227. Susan L. Burrell, *Gang Evidence: Issues for Criminal Defense*, 30 SANTA CLARA L. REV. 739, 755 n.65 (1990) (citing Rea Dupree, *Tattoo Removal Demand Growing*, L.A. TIMES, Dec. 6, 1984, at II-16).

228. See Matthew Mickle Werdegar, Note, *Enjoining the Constitution: The Use of Public Nuisance Abatement Injunctions Against Urban Street Gangs*, 51 STAN. L. REV. 409, 423 n.86 (1999). “[O]ne reason put forth by the Los Angeles District Attorney’s office for why so many young African American males show up in the Los Angeles gang database is that the clothing, tattoos, music, and other paraphernalia equated by law enforcement with gang membership are popular among black youth in general.” *Id.*

#### 6. An Individual Is Arrested Participating in Delinquent or Criminal Activities with Known Documented Gang Members

Although perhaps the most accurate of the enumerated criteria, participation in delinquent or criminal activities still lacks reliability as a factor for identifying active street gang members. Because this criterion includes acting with a known gang member, many of the concerns associated with the first factor, self-identifying as a gang member, may arise. Also, gang membership assumes a continuous, regular relationship with the gang. Under this criterion, a person who is arrested with a known gang member only once may be identified as a gang member. Apparently, “only the stubbornly anti-social criminal can escape labeling as a gang member.”<sup>229</sup>

### IV. CONCLUSION

The mechanisms developed by the criminal justice system to address the criminal activities of street gangs, for the most part, have been ineffective. The evolution of the gangs and their complex structure and multipurpose focus keep gangs one step ahead of law enforcement. The most recent weapon in the war on gangs, the civil injunction, suffers from numerous inadequacies. Civil injunctions raise substantial constitutional concerns. Additionally, the practical implementation of the injunctions force an analysis of the reliability of the gang expert’s testimony.

Courts should exclude the testimony of gang experts without a showing of sufficient reliability.<sup>230</sup> The opinions of gang experts

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229. Jeffrey J. Mayer, *Individual Moral Responsibility and the Criminalization of Youth Gangs*, 28 WAKE FOREST L. REV. 943, 970 (1993).

230. Alaska has a unique method for addressing the reliability of gang expert testimony. See ALASKA STAT. § 12.45.037 (2002). Section 12.45.037 amended ALASKA RULE OF EVIDENCE 702(a) to allow the admission of expert testimony to show criminal gang characteristics, activity, and practices. 2002 Alaska Sess. Laws ch. 60, § 11. Section 12.45.037(a) reads:

(a) In a criminal prosecution, expert testimony is admissible to show, in regard to a specific criminal street gang or criminal street gangs whose conduct is relevant to the case,

(1) common characteristics of persons who are members of the criminal street gang or criminal street gangs;

(2) rivalries between specific criminal street gangs;

(3) common practices and operations of the criminal street gang or criminal street gangs and the members of those gangs;

regarding criminal street gangs, gang activity, and particularly an individual's membership in a gang are typically supported by little more than the "expert's" credentials. Gang experts are usually deemed qualified to give opinions regarding gangs because they have sufficient training and have observed gangs and gang activity. However, their testimony is limited by the reliability of the methods and data they use. The criteria adopted by the State of Texas that determines gang membership, much like the criteria used in cities across the nation, is notable for its "circuitry and potential for abuse,"<sup>231</sup> and not its reliability. Furthermore, although the gang experts are generally experienced and trained, "[r]epeated observations of an event without inquiry, analysis, or experiment does not turn the mere observer into an expert."<sup>232</sup> Accordingly, their testimony regarding gang membership does not meet the reliability requirements of Texas Rule of Evidence 702 and thus, should be excluded.

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- (4) social customs and behavior of members of the criminal street gang or the criminal street gangs;
  - (5) terminology used by members of the criminal street gang or the criminal street gangs;
  - (6) codes of conduct of the particular criminal street gang or criminal street gangs; and
  - (7) the types of crimes that are likely to be committed by the particular criminal street gang.

ALASKA STAT. § 12.45.037(a) (2002). Notably, the statute does not allow testimony regarding an individual's membership in a gang without a finding of reliability under Rule 702.

231. Jeffrey J. Mayer, *Individual Moral Responsibility and the Criminalization of Youth Gangs*, 28 WAKE FOREST L. REV. 943, 966 (1993).

232. Susan L. Burrell, *Gang Evidence: Issues for Criminal Defense*, 30 SANTA CLARA L. REV. 770, 770 (1990).