


Spring 4-1-1995

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Recommended Citation

D. Cameron Beck, Jr., *THE BALANCE BETWEEN FIGHTING STREET GANGS AND ADHERING TO THE CONSTITUTION IN SOUTHERN CALIFORNIA*, 1 *Race & Ethnic Anc. L. Dig.* 30 (1995).
Available at: <https://scholarlycommons.law.wlu.edu/crsj/vol1/iss1/8>

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THE BALANCE BETWEEN FIGHTING STREET GANGS AND ADHERING TO THE CONSTITUTION IN SOUTHERN CALIFORNIA

D. Cameron Beck, Jr.¹

I. INTRODUCTION

In recent years, Americans have become increasingly concerned with the amount of violence in our society. Perhaps no phenomenon better symbolizes our violent culture than the growth in membership and power of street gangs. Gangs represent a host of social problems: the deterioration of urban America, decay of the traditional family, and complete disregard for moral values. As America searches for the causes of this widespread youth violence, law enforcement officials face an equally difficult task: how to immediately control gang violence without undermining the United States Constitution.

Street gangs pose a unique challenge to police. By flaunting the "colors" of their group, members of a gang are readily identifiable. Also, gang members maintain a highly visible public presence by congregating in parks or on particular street corners.² Ironically, this high profile seems to hinder, rather than aid, law enforcement efforts because of the time spent surveilling or controlling the gangs' public, noncriminal activities. Additionally, youth gangs are unlike other criminal organizations in that their structure is highly disorganized.³ Because of this loose organization, police have difficulty predicting criminal activity. Instead, they often find themselves responding to random and unexplained acts of gang violence.

To combat the threat of gangs, the police and our judicial system have searched for new strategies to prevent gang violence. Fear of gangs has led to many outlandish proposals that threaten our most basic constitutional rights. For example, legislation in California proposed restricting gang members to

their homes for all but five minutes a day.⁴ The tremendous national alarm over gang violence is symbolized by Congress' consideration of an amendment to the federal crime bill that would federalize every gang crime.⁵ As gang violence expands across the country, legislators and law enforcement officials continue to seek new methods to prevent gang violence without infringing upon constitutional rights.

This paper studies several controversial techniques adopted by southern California law enforcement to fight gangs.⁶ The study of this particular region is appropriate because of the tremendous growth and success of gangs.⁷ This problem has forced southern California to become a leader in the development of new tactics to limit gang violence.

II. BACKGROUND

One of the first difficulties of this topic is defining "street gang." While a gang can be defined in many ways, the Los Angeles Police Department (LAPD) broadly defines a gang as "a group of people who form an allegiance for a common purpose and engage in violent, unlawful, or criminal activity."⁸ In most instances, members are youths. Also, the youths are almost entirely blacks and Hispanics. Generally, Hispanic gangs form with the sole purpose of defending their "territory" while black gangs are more sophisticated and involved in the narcotics trade.⁹

In 1981, Los Angeles County law enforcement agencies estimated that three hundred gangs existed in the county and were comprised of approximately 30,000 members. By 1994, the number of gangs rose to one thousand with more than 130,000 members.

¹ *Juris Doctor*, Washington and Lee University School of Law (1995), Bachelor of Arts, College of William and Mary (1990).

² Los Angeles Police Department, *Stop Street Gangs & Violence*.

³ Burrell, *Gang Evidence: Issues for Criminal Defense*, 30 Santa Clara L. Rev. 739, 749 (1990).

⁴ Mydans, *Powerful Arms of Drug War Arousing Concern for Rights*, Los Angeles Times, Oct. 16, 1989, at A1.

⁵ Braun and Pasternak, *A Nation with Peril on its Mind*, Los Angeles Times, Feb. 13, 1994, at A1.

⁶ This paper focuses on tactics to prevent violence in the streets and therefore, does not discuss strategies implemented in schools, such as clothing bans and metal detectors.

⁷ *Juvenile Justice Response to Gangs: Before the Senate Judiciary Committee*, 103rd Cong., 2nd Sess. (1994) (statement of Sergeant Michael Nichols, St. Louis Police Department). In his testimony, Nichols stated that the gang population of Orange County and Los Angeles represented more than half the authorized strength of the United States Marine Corps during peacetime.

⁸ Los Angeles Police Department, *supra* note 1.

⁹ Los Angeles Police Department, *supra* note 1.

In 1992, over eight hundred gang-related homicides occurred in Los Angeles county. Orange County has another 38,000 gang members and had over sixty gang killings in 1992.¹⁰ The Crips and Bloods, L.A.'s most prominent gangs, now have "affiliations" in thirty-two states and 113 cities.¹¹

Local, state and federal governments have enacted social and educational programs to decrease the power and violence of gangs. One of the federal government's recent efforts has been the "Weed and Seed" program. Former President Bush inaugurated this program to weed out criminals from neighborhoods and seed the areas with social programs.¹² Other programs include early educational intervention to teach children the dangers of gangs. Midnight basketball leagues, operating in many cities, have been highly touted for keeping gang members off the streets.¹³ While all these programs offer hope to decrease gang activity, they do not provide immediate solutions or tools to decrease the violence committed by active gang members.

As government agencies and community groups formulate long-term solutions to this structural problem, law enforcement agencies in southern California face the challenge of controlling the daily violence and protecting citizens. Neither the police nor southern Californians are willing to wait for social programs to turn youths away from the gang culture. The introduction of high-tech weapons combined with the spread of gangs to suburban areas has heightened the public's concern. In the past, gangs mainly affected disadvantaged, urban areas and directed acts of violence towards rival gangs. This is no longer true of gangs today.¹⁴ The number of innocent victims of gang-related violence has dramatically increased, and as gangs spread from the inner cities, public awareness and outrage increase.

The growth in gang membership and violence reveals that police have not been successful in fighting these criminal organizations. The failure to control the gangs has occurred due to a number of reasons. To many youths, the gang serves as a family substitute. A shortage of community programs and

a loss of economic opportunity steer some youths towards gangs for entertainment and companionship as well as for a means of making a living.¹⁵ This constant supply of new members compensates for members who are sent to jail or choose to leave the gang. The fluidity of gang membership coupled with the lack of any real organizational structure means that police cannot cripple a gang by arresting a leader.¹⁶ Growth in gang membership and violence increased in the late 1980's despite increased police patrols and gang member arrests.¹⁷ Law enforcement officials find it frustrating to simply respond to such violence without having any effective preventive strategies.

A. Preventive Tactics to Curb Violence

As the failure to deter youths from crime becomes increasingly evident, law enforcement, local government and citizens have called for new methods to halt the rising violence. The response to this public outcry has resulted in the creation of three general types of preventive action. However, many of these new methods raise troubling questions regarding the constitutional rights of gang members.

First, in an effort to aid in identification of gang members, police have extended the traditional compilation of mug shots. Historically, investigations have used pictures of convicted criminals and likely suspects so that victims can identify the offender. Now, some police departments have developed "gang books" which contain photographs of any youths who are suspected gang members.¹⁸

The execution of gang sweeps appears to be the most questionable and outrageous means to prevent gang activity. Developed by LAPD Chief of Police Daryl Gates, gang sweeps consist of mass arrests and detentions of gang members.¹⁹ Serious Fourth Amendment concerns surround this LAPD exercise which encourages officers to stop any individual that displays evidence of gang affiliation.

A third technique involves various means to prevent gang members from congregating in public. Officials have instituted these bans on assembly

¹⁰ *Juvenile Justice Response to Gangs: Before the Senate Judiciary Committee*, *supra* note 6.

¹¹ Witkin, *Kids Who Kill*, U.S. News & World Report, Apr. 8, 1991, at 26.

¹² Turque, *Bush's Weed and Seed*, Newsweek, May 25, 1992, at 28.

¹³ Armstrong, *L.A. Fights Gangs with Basketballs*, Christian Science Monitor, May 17, 1990, at 6.

¹⁴ *Juvenile Justice Response to Gangs: Before the Senate Judiciary Committee*, *supra* note 6.

¹⁵ Burrell, *supra* note 2, at 749.

¹⁶ Burrell, *supra* note 2, at 750.

¹⁷ Hangartner, *The Constitutionality of Large Scale Police Tactics: Implications for the Right of Interstate Travel*, 14 Pace L. Rev. 203, 210 (1994); Gantman, *Regional News*, UPI, Oct. 30, 1988.

¹⁸ Maharaj, *O.C. Police Decry Gang Photo Ruling*, Los Angeles Times, Dec. 4, 1993, at A1.

¹⁹ Hangartner, *supra* note 16, at 210 n.5. (defining sweep as a "highly, focused, large-scale police mobilization intended to control street crime by arresting large numbers of people in a short period of time").

through local ordinances and court orders. Related tactics include curfews and the banning of gang clothing from schools. These government actions have serious First Amendment implications because citizens, not convicted of any crime, are prevented from fully exercising their right to associate or to free speech.

B. Legislative Effort

Before scrutinizing these three methods, a state-wide reaction to the violence should be examined. In 1988, the California Legislature reacted to the "state of crisis . . . caused by violent youth gangs," and enacted the Street Terrorism and Prevention Act (STEP) to punish gang members who participate in violent activity.²⁰ The law prohibits the promotion, furtherance or assistance of any felonious criminal conduct by members.²¹ Simple membership in a gang does not incur liability. The statute requires that the member willfully encourage criminal conduct by a gang.²²

In *People v. Gamez*,²³ and *People v. Green*,²⁴ defendants unsuccessfully challenged the statute as constitutionally vague and overly broad in that it does not adequately define "membership" or "criminal street gang." California courts have generally held that the terms address criminal conduct and do not prohibit mere association. In practice, STEP serves to criminalize the aiding and abetting of a felony committed by member(s) of a street gang.²⁵

Another questionable aspect of the STEP legislation involves the "gang mom law" which holds parents accountable for not exercising reasonable supervision over their children's activities.²⁶ In one high profile case, the City of Los Angeles filed charges against a mother based on a police photograph showing her with gang members and while flashing a gang sign.²⁷ Although the law provides for up to one year in jail and a \$1,000 fine, the City of Los Angeles has generally only required parents to enroll in parenting classes. The American Civil Liberties Union (ACLU) has represented numerous

parents charged under STEP, and in almost every case, the City has dropped the charges against the parents.²⁸

Although the California Court of Appeals struck down the gang mom part of the statute, the California Supreme Court upheld this provision of STEP recently in *Williams v. Garcetti*.²⁹ The Court did hold that the law may be used only in cases of criminal negligence and where the parent "causes or encourages a child . . . to engage in delinquent acts."³⁰ The statute requires "reasonable," not successful, supervision by parents.³¹

III. GANG BOOKS

In Fountain Valley, a city in Orange County, police compiled a book of photographs of Asian-American youths who were suspected gang members. Even though most of the youths had never been arrested, the police had pictures of over six hundred such "suspects." Considered vigorous law enforcement by city officials, this practice has caused protests. Other police departments in southern California have adopted this tactic of cataloging gang members.³²

In November of 1993, the California Court of Appeals held in *People v. Rodriguez*³³ that a photograph of a youth could not be admitted into evidence because it resulted from an illegal seizure. Police officers had stopped the individual and taken his photograph solely on the suspicion that he was a member of a gang. This unpublished opinion held that the officers could not make such a detention unless there existed evidence of criminal activity.³⁴ The *Rodriguez* case represents a more complicated Fourth Amendment case than most other gang book situations. After complaints by the community and parents, the Fountain Valley police began to ask for consent before taking individuals' pictures.³⁵ Asking for permission to take a picture is analogous to the situations of airport stops in drug courier profile cases. In *United States v. Mendenhall*,³⁶ the U. S. Su-

²⁰ CAL PENAL § 186.20 (West 1994).

²¹ CAL PENAL §186.22(a) (West 1994).

²² Burrell, *supra* note 2, at 753.

²³ 1991 Cal. App. Lexis 1275 (1991).

²⁴ 1991 Cal. App. Lexis 220 (1991).

²⁵ *Id.* at *3.

²⁶ CAL PENAL § 272 (West 1994).

²⁷ Bursma, *When Mom's Just One of the Gang*, Chicago Tribune, May 7, 1989, at 2.

²⁸ Cooper, *Justices Uphold "Gang Mom" Law*, Sacramento Bee, July 2, 1993, at A1.

²⁹ 853 P.2d 507 (1993).

³⁰ *Id.* at 514.

³¹ *Id.*

³² De Tran and Yokoi, O.C. *Asians Say Police Photos are Harassment*, Los Angeles Times, Nov. 15, 1992, at A1.

³³ 1993 Cal. App. Lexis 1294 (1993).

³⁴ *Id.* at 663-64.

³⁵ Tsang, *Is 'Innocent Until Proven Guilty' A Lost Principle?*, Los Angeles Times, Aug. 30, 1993, at B5.

³⁶ 446 U.S. 544 (1980).

preme Court ruled that officers may approach a citizen and ask to search his person or property. If consent is granted and deemed to be "voluntary" consent, the stop does not constitute a search or seizure.³⁷ Therefore, if youths give consent for a photograph, the Fourth Amendment is not invoked. Even if "airport stops" are differentiated because of the overriding security concern, permission to take a photograph is similar to receiving consent to search a vehicle or house. If an individual consents to the search, the Fourth Amendment is not violated.³⁸

The concern with these "consent cases" is the voluntariness of youths in granting consent. In a typical fact pattern, one or two officers will approach a young teenager and ask for his picture. Officers might even threaten to take the picture without consent. The specific circumstances, including the age and education, must be examined to determine if the youth voluntarily allowed his picture to be taken. If valid consent is not granted, the case must be examined similar to the *Rodriguez* case analysis.

In *Rodriguez*, the principal question concerned whether the police photographed the defendant illegally during a field interrogation.³⁹ Turning again to drug courier profile cases, the standard for determining if a seizure has occurred is whether a person would feel reasonably free to leave under the circumstances.⁴⁰ In *Rodriguez*, the police officers directed the defendant and four other youths to sit on a curb. The officers held the youths for fifteen to twenty minutes while they interviewed and photographed each youth.⁴¹ At no time did the policemen tell the youths they were free to leave. As the appeals court found, this set of facts demonstrates a clear Fourth Amendment seizure: the officers detained the youths for fifteen minutes and the youths believed they were not allowed to leave until the police granted permission.⁴²

Once it has been established that a seizure did occur, the next issue concerns whether the authorities had legitimate reasons for the detention. The U.S. Supreme Court's ruling in *Terry v. Ohio*,⁴³ which defines a search under the reasonableness clause, permits a detention if police have reason to believe the detainee is involved in criminal activity. In *Rodriguez*, which involved a charge of murder, the

photographs offered at trial were taken before the actual crime.⁴⁴ Police identified the suspect by displaying a gang book to witnesses.⁴⁵ In this case, the officers did not have any evidence of ongoing criminal activity when they stopped the youths.⁴⁶ Consequently, the search violated the Fourth Amendment.⁴⁷

In response to public protests over the Fountain Valley police practices, authorities required policemen to obtain verbal consent for photographs. Other police departments, such as Santa Ana's, require written consent.⁴⁸ As explained above, this practice passes muster under the Fourth Amendment unless the police presence compels the consent.

Even though most police departments' regulations require consent to photograph, some law enforcement authorities, including the Chief of Police of Fountain Valley, have asserted the law does not require permission to photograph provided the photos are used for internal intelligence purposes only.⁴⁹ Such a belief must be based on the premise that the Fourth Amendment is not invoked by taking the picture. However, whenever a policeman directs a youth to remain still for a picture, a detention occurs under the Fourth Amendment provided a reasonable person would not feel free to leave. Therefore, the claim that consent is not necessary must be based on a situation where a youth is not stopped but his picture is taken, either with or without his knowledge. The conclusion that the Fourth Amendment is not invoked in this situation is quite sensible when based on one's reasonable expectation of privacy. The U.S. Supreme Court has held that "what a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection."⁵⁰ By appearing in public, an individual must risk his picture being taken by the police or anyone else.

A. First Amendment Protection

Instead of seeking protection under the Fourth Amendment, members of gangs might claim that the compilation of gang books violates the First Amendment. Police take the photos because they suspect the youths to be members of a gang. This state action appears to violate the First Amendment since the youths were singled out for their expres-

³⁷ *Schneckothe v. Bustamonte*, 412 U.S. 218, 248-249 (1973).

³⁸ *Zap v. United States*, 328 U.S. 624, 630 (1945).

³⁹ 1993 Cal. App. Lexis at *9.

⁴⁰ *Mendenhall*, 446 U.S. at 544, 554.

⁴¹ *Rodriguez*, 26 Cal. Rptr. 2d. at 663.

⁴² *Id.* at 663.

⁴³ 392 U.S. 1 (1968).

⁴⁴ *Rodriguez*, 1993 Cal. App. Lexis at *5.

⁴⁵ *Id.* at *4.

⁴⁶ *Id.* at *6.

⁴⁷ *Id.*

⁴⁸ De Tran and Yokoi, *supra* note 31, at A1.

⁴⁹ *Id.* at A1.

⁵⁰ *Katz v. United States*, 389 U.S. 347, 351 (1967).

sion (clothing) and association. In *Laird v. Tatum*,⁵¹ the U. S. Supreme Court held that government surveillance, by photographs and other means, does not violate the First Amendment unless an injury occurred or harm to the plaintiff may be immediate. In the case of youths, such as Asian-Americans in Fountain Valley, the photos did not cause any injury. The only "chilling effect" might be to discourage gang activity.⁵² Since the photos do not cause any actual injury, courts would be expected to find this action as part of a state's police powers. However, if the photos are publicly posted or included in general criminal files, gang members might succeed in claiming an actual injury through a defamation claim.

B. Equal Protection

Finally, one other avenue of terminating the use of gang books might be an equal protection claim under the Fourteenth Amendment because of the officers' focus upon minorities. The Asian-Americans in Fountain Valley certainly appear to have a strong claim since officers admitted to compiling information on Asian-Americans almost exclusively. The police can overcome this prima facie case by establishing that only Asian-Americans were involved in gangs in Fountain Valley. To assert a violation of equal protection, the affected minority must establish that certain youths were surveilled because of their race.⁵³

IV. GANG SWEEPS

Prior to the Rodney King beating, LAPD Chief of Police Daryl Gates instituted one of his most controversial tactics in the summer of 1988 with the introduction of "the Hammer." This operation consisted of "gang sweeps" where hundreds of LAPD officers invaded gang areas and arrested as many suspected gang members as possible. While sweeps existed before 1988, that year saw a dramatic rise in the number and size of the police actions. In 1988, the LAPD arrested over 20,000 persons as a result

of these sweeps with 1500 arrests occurring in a single weekend.⁵⁴

The purpose of gang sweeps is to place pressure on gangs through intimidation. Chief Gates characterized these sweeps as a military battle designed to suppress all gang activity.⁵⁵ While few arrestees are ever formally charged, the police hope their tactics generate respect for law and order. During the sweeps, police seize as many automobiles as possible in order to make the gangs less mobile.⁵⁶ Also, police seek to increase awareness among parents by requiring them to pick up their children at the police station. In spite of these intentions, many experts believe the short detentions give detained youths a reputation for toughness and actually strengthen gangs.⁵⁷

Gates' description of Operation Hammer evokes images of a totalitarian regime storming throughout the city with little respect for individual liberties.⁵⁸ The ACLU, academics and even some residents have declared that the drastic police tactics deprive citizens of their constitutional rights.⁵⁹ By most accounts, the police only arrest or detain individuals if the law has been violated although many persons claim the police only require youths to look suspicious.⁶⁰ In any event, many of the arrests seem to occur for nothing more than a traffic violation. During the weekend in which 1500 arrests were made, the government developed cases against only 103 of those persons arrested.⁶¹ Clearly, the LAPD never intended to charge the vast number of persons arrested.

The most pressing constitutional issue concerns the arrest of individuals by officers without probable cause.⁶² Chief Gates' "warfare" mentality encourages the detention of individuals even when officers realize probable cause does not exist. However, the Fourth Amendment demands that arrests or detentions must be based on "something more than an 'inchoate and unparticularized hunch.'"⁶³

To uphold the arrests, law enforcement officials might try to justify their actions based on gang vio-

⁵¹ 408 U.S. 1 (1972).

⁵² See *Donohoe v. Duling*, 465 F. 2d 196, 199 (1972)(discussing the chilling effect of government surveillance).

⁵³ *Washington v. Davis*, 426 U.S. 229, 239 (1976).

⁵⁴ Gantman, *supra* note 16.

⁵⁵ Burrell, *supra* note 2, at 741.

⁵⁶ "Hammer" Strikes Again, UPI, July 8, 1989.

⁵⁷ McGarry and Padilla, *Experts Warn Gang Sweeps May Have a Negative Effect*, Los Angeles Times, Apr. 24, 1988, at Metro 1.

⁵⁸ Burrell, *supra* note 2, at 741.

⁵⁹ Monroe, *Complaints About A Crackdown: Minorities Charge that the Los Angeles Police Department's War on Gangs has become a War on their Communities*, Time, July 16, 1990, at 20.

⁶⁰ Schultz, Note, "The Right to be Left Alone": Fourth Amendment Rights and Gang Violence, 16 West. State Univ. L. Rev. 725, 735 (1988).

⁶¹ Burrell, *supra* note 2, at 743.

⁶² Schultz, *supra* note 59, at 735.

⁶³ *United States v. Sokolow*, 490 U.S. 1, 7 (1989)(quoting *Terry v. Ohio*, 392 U.S. 1, 27 (1968)).

lence as an exigent circumstance. However, the arrests during gang sweeps do not ordinarily occur to prevent the escape of a suspect, the destruction of evidence or human injury.⁶⁴ Even if exigent circumstances did exist, the arrests still require probable cause.⁶⁵ Furthermore, the warrantless arrests cannot be defended as administrative searches because the arrests are personal seizures and not analogous to administrative inspections.⁶⁶

Assuming probable cause does exist, the idea that police can execute mass arrests with the purpose to simply harass individuals, absent any intention of pressing charges, appears outrageous. However, this aspect of gang sweeps does not involve unconstitutional procedures. The state retains complete discretion whether to prosecute an individual after his arrest.⁶⁷ Therefore, law enforcement officials can seek out suspected gang members even though the state intends to subsequently release the large majority of the individuals without charges.

A. Gang Member Profiles

Constitutional concerns do arise over the LAPD's targets during the drug sweep. Officers know that gang members are young minority youths dressed in particular fashions and colors. Therefore, under the guise of department policy, police officers seek to arrest or detain persons who fit this profile. While the LAPD does not admit to employing a gang profile, there is no question that officers can easily identify a gang member.⁶⁸ Race is certainly an unstated or subconscious characteristic of the profile since the Department recognizes that Hispanics and blacks "account for almost all of the violent street gang crimes in L.A."⁶⁹ Even assuming probable cause exists for every arrest, an equal protection question arises because the police target minorities, chiefly Hispanics and blacks, who constitute a suspect racial classification.⁷⁰

Considering that gangs consist almost solely of minority youths, it must be expected that gang sweeps will result in the arrest of minority youths. The effect of these sweeps upon minority youths gives rise to the question of whether the police are adhering to the principle of equal protection. Such a disparate number of arrests does not violate this constitutional clause unless the state entity has a discriminatory intent.⁷¹ In the case of gang sweeps, the LAPD identifies gang members by a general profile based primarily on dress.⁷² Whether officially acknowledged by the LAPD or not, race also constitutes part of the profile.⁷³ The question of an equal protection violation relies on whether this profile constitutes discriminatory intent.⁷⁴

This issue can be compared to law enforcement's reliance on a drug courier profile. Utilized chiefly in airports, this profile consists of a number of characteristics, one of which is race.⁷⁵ The Supreme Court has held that a number of objective factors, similar to a profile, can amount to reasonable suspicion for detention.⁷⁶ Since drug and gang profiles are used to target individuals, the two practices concern a near identical constitutional question under the Equal Protection Clause. In both instances, the investigatory procedure involves identifying potential suspects based on the profile, approaching the individuals, and eventually determining if probable cause exists to make an arrest.

Drug courier profiles generally contain a large number of characteristics although not all are necessary to make a stop.⁷⁷ Gang profiles contain a smaller number of factors including age, sex, race, clothing, and geographical location. Consequently, police place a much greater emphasis on race in determining who to stop during gang sweeps than anti-drug operations. As the significance of race increases, so does the likelihood that this gang control method violates equal protection.

⁶⁴ Schultz, *supra* note 59, at 734.

⁶⁵ *United States v. Place*, 660 F.2d 44, 47 (2d Cir. 1981).

⁶⁶ *Camara v. Municipal Court of the City & County of San Francisco*, 387 U.S. 523, 538-39 (1967).

⁶⁷ *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1977).

⁶⁸ Telephone Interview with Detective Zegman, Los Angeles Police Department, March 31, 1994. Detective Zegman stated that the LAPD does not use an official gang profile. Contrary to Zegman's statement, some authorities have found that the LAPD does indeed employ a gang profile. Burrell, *supra*, note 2, at 751 n.52 (citing Jackson and McBride, *Understanding Street Gangs*, 98-104 (1985)).

⁶⁹ Los Angeles Police Department, *supra* note 1.

⁷⁰ *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

⁷¹ *Washington*, 426 U.S. at 239.

⁷² Burrell, *supra* note 2 at 743.

⁷³ Los Angeles Police Department, *supra* note 1.

⁷⁴ *Washington*, 426 U.S. at 239.

⁷⁵ Generally, law enforcement officials will not admit that race is a factor. However, this factor has been admitted in a limited number of cases and some courts have tacitly approved race as part of the profile. See Johnson, *Race and the Decision to Detain a Suspect*, 93 Yale L. Rev. 214, 234-35 (1983); See also *Place*, 660 F.2d at 48; *United States v. Weaver*, 966 F.2d 391, 394 (8th Cir. 1992).

⁷⁶ *Sokolow*, 490 U.S. at 9.

⁷⁷ *Place*, 660 F.2d at 48.

Another critical difference exists between the two types of profiles. Law enforcement officials will stop a person who fits the drug courier profile because the individual is suspected of currently engaging in criminal activity (carrying illegal drugs). The LAPD's gang sweeps will detain suspected gang members even though there is no evidence of ongoing criminal activity.⁷⁸ In gang sweeps, police stop individuals because there is a reasonable suspicion of gang activity, but there may be no evidence of any past, present or future illegal activity.

The use of profiles should also be considered in light of the fact that police often arrest gang members based on the profile alone.⁷⁹ Courts do not allow the arrest of suspected drug couriers if the police do not find probable cause. The drug courier profile by itself does not support a finding of probable cause. Assuming that the drug courier and gang profiles are subject to the same constitutional standards, police officers should not be allowed to arrest suspected gang members when probable cause does not exist.

B. Decline of Gang Sweeps

For the most part, the LAPD has halted massive gang sweeps. After 1988 and 1989, the LAPD and surrounding counties conducted only limited sweeps directed at a single house or gang. The police ended their massive sweeps that yield hundreds of arrests. The decline in sweeps occurred for a number of reasons including judicial and public concern over their constitutionality.⁸⁰ Officially, the LAPD states that manpower shortages have curbed the sweeps as well as the belief that the tactic is only a "band-aid" approach.⁸¹

V. BANS ON PUBLIC ASSEMBLY

Another type of gang control measure has been the development of bans on the public assembly and association of gang members. With the increasing awareness of violent street crime, citizens have demanded that local governments react to the apparent domination of public streets and parks by gang members. One response of local governments has

been restrictions on gang members appearing in public places with each other. This type of government action raises immediate concerns over the First Amendment right to free speech and public assembly and the Fourteenth Amendment right to equal protection. In most cases, the government prohibitions restrict public appearances or associations regardless of whether the individual gang members have participated in past criminal activity.

A. Specific "Gang Bans"

The specific type of government action has taken many forms. In 1989, the City of Los Angeles enacted a trespassing ordinance providing that police could arrest any trespasser who has been ejected from a housing project within the past thirty days. Under the old law, police could only arrest a trespasser if he refused to leave the housing project. The large public housing complexes are used by drug dealers because the projects contain many hiding places and access roads.⁸² This ordinance, which appears to have been one of the first steps in cracking down on gangs in public, does not curtail any constitutional rights. The city council merely increased the penalty for trespassing in housing projects.

Government action has advanced much further than the previously described ban. In San Fernando, a 1990 city ordinance barred gang members from a park. The law required police officers to identify gang members and give them a written warning of the ban. The ACLU unsuccessfully challenged this ordinance.⁸³ In Los Angeles, the city attorney obtained a court order barring 350 suspected gang members from participating in certain activities over a one hundred block area. The named individuals could not carry large flashlights, hammers, gang logo belt buckles, pagers, cellular telephones, or two-way radios.⁸⁴ This court order remains in effect, and the city is considering applying the ban to other areas.⁸⁵ Burbank city officials secured a permanent injunction, after initially being granted a temporary restraining order, that barred eighty-eight gang members from congregating together on a particular street. Fifteen of the members actually lived on the street.⁸⁶

⁷⁸ Schultz, *supra* note 59, at 735.

⁷⁹ *Id.* at 735.

⁸⁰ See Hangartner, *supra* note 16, (stating the effect of gang sweeps upon the constitutional rights of the whole community, not just gang members).

⁸¹ Telephone Interview with Detective Zegman, *supra* note 66.

⁸² Ford, *Trespassing Ordinance Targets Drug Dealers*, Los Angeles Times, Oct. 13, 1989, at B1.

⁸³ Zamora, *Ban Loosens Gang's Grip on a Burbank Street*, Los Angeles Times, Nov. 1, 1992, at B3.

⁸⁴ *Ban on Blythe Streets Gangs May Go Too Far*, Los Angeles Times, Aug. 29, 1993, at B12.

⁸⁵ *Conversation with Detective Zegman*, *supra* note 66.

⁸⁶ Zamora, *supra* note 81, at B3.

In Westminster, California, the city obtained a temporary restraining order that prevented gang members from appearing together in public over a twenty-five block area. If members violated the order, they would be considered a public nuisance. Subsequently, the Orange County Superior Court held the Westminster order to be unconstitutional when the police asked to extend the temporary order. The court ruled the law to be an "impermissible invasion of privacy" and an unconstitutional restriction on association.⁸⁷

B. Constitutionality of Bans

All of the different types of bans and curfews impact the First Amendment right to freedom of assembly. Citizens of gang-ridden areas often proclaim the law should disregard the constitutional rights of gang members.⁸⁸ They contend that the rights of law-abiding citizens should be the only ones considered and protected. Consequently, citizens justify this type of gang suppression since it protects the rights of terrified residents. In a legal context, this argument can be understood as a compelling state interest to protect the rights of other citizens that overrides the constitutional rights of gang members.

The "gang bans" do not regulate the content of the assembly or association but, instead, prevent the act of associating together or appearing in areas considered traditional public forums.⁸⁹ In analyzing such state action, courts will only approve content-neutral regulations on time, place and manner of expression if they meet substantial government interests and are narrowly tailored.⁹⁰ The Supreme Court has repeatedly held such reasonable limitations valid under the First Amendment.⁹¹ In the case of gangs, the substantial government purpose includes diminishing gang violence and protecting citizens and their quality of life. City officials have reacted to public outcry over the threat of gangs. Statistics demonstrate that youth gangs are responsible for an overwhelming amount of violence in southern California.⁹² Accordingly, legislation prohibiting gang mem-

bers from appearing in public should inhibit gang activity and lead to a decrease in overall violence. The government action will also serve to protect the health and safety of public citizens.

Even though substantial government interests exist, the restrictions will not pass constitutional scrutiny if they are not narrowly tailored towards meeting the interests.⁹³ For example, courts have generally upheld nocturnal curfews for juveniles provided they are not overly restrictive. In drafting the curfews, governments routinely include provisions within the legislation that provide for exceptions if a minor is accompanied by a parent or is travelling to a school function or employment. The inclusion of these exceptions is usually sufficient to support the curfews under the First Amendment because the curfews are narrowly tailored to prevent juvenile delinquency.⁹⁴

The constitutionality of southern California's various gang bans must be subjected to scrutiny similar to that of curfews because their validity depends upon the extent of the legislation or court order. Generally, the different types of bans prevent gang members from congregating on a particular street or in a park. In most instances, the youths have not been convicted or even accused of a specific crime.

The Burbank court order which prevents gang members from associating together in a specific area typifies an attempt to narrowly draw the restrictions. Although the order covers twenty-four hours a day, the order names specific gang members and applies to a narrowly defined area, not the whole city. However, the Westminster order, despite its similarity to the Burbank order, has been found unconstitutional because it banned association rather than actual conduct.⁹⁵ This apparent inconsistency indicates the difficulty of determining the ban's constitutionality.

Judicial decisions regarding the gang bans rely on the narrowness of the specific provisions of the legislation or order. Provisions such as naming specific individuals, instead of large gangs, and requiring affected individuals to be notified of the bans

⁸⁷ Eljera, *Judge's Ruling on Gangs Appealed*, Los Angeles Times, Oct. 28, 1993, at B4.

⁸⁸ Di Rado, *Westminster Residents Regret Loss of Crime-Fighting Tool*, Los Angeles Times, August 31, 1993, at A1.

⁸⁹ The Supreme Court has recently held that the right to association does not apply to "social association." *City of Dallas v. Stanglin*, 490 U.S. 19, 28 (1989). The right to association does exist as a right to assemble with other citizens in public.

⁹⁰ *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 45 (1983).

⁹¹ *Police Department of Chicago v. Mosley*, 408 U.S. 92, 98 (1972).

⁹² *Juvenile Justice Response to Gangs: Before the Senate Judiciary Committee*, *supra* note 6.

⁹³ *Perry Education Association*, 460 U.S. at 45.

⁹⁴ *Qutb v. Strauss*, 11 F.3d 488, 494 (5th Cir. 1993).

⁹⁵ Pinsky, *O.C. Law Enforcement: Gangs Have Free Rein*, Los Angeles Times, Sept. 1, 1993, at A1.

operate to narrow the impact of the bans. Limiting the bans to a relatively small geographical area also enhances the potential of the ban passing constitutional muster. By limiting the restrictions, officials help to ensure the action is not deemed overly broad.

Another constitutional consideration of these bans involves the vagueness of the statute or order itself. A law will be declared overly vague if its application is facially unclear.⁹⁶ In many instances, the term gang member is not defined. However, an amendment to the STEP legislation defined this term and is now used by localities in defining gang members.⁹⁷

C. Equal Protection

Another constitutional issue concerning bans on assembly involves the violation of equal protection of the laws. In southern California, the legislation or court orders divide the population into two groups: gang members and other citizens. Strict scrutiny must be applied to the bans since the law affects the individuals' fundamental right to assemble in public.⁹⁸ Also, the statutes or orders affect primarily minority individuals who are a suspect class.⁹⁹ The compelling state interests in this case is equivalent to the substantial government interests under the First Amendment examination (public health and safety).

While compelling state interests exist, the more difficult analysis involves deciding whether the legislation is narrowly tailored. The government action will most likely be considered narrowly tailored if it serves as a limited and targeted means to decrease juvenile delinquency. Other methods are available to decrease gang violence, such as increasing police protection. The constitutionality depends on whether courts find less restrictive methods to meet the state interests. As discussed above, officials are increasing the specificity of the bans. Consequently, it is easier to find the state action to be narrowly tailored.

D. Effect of Gang Bans

Public officials and citizens dispute the overall effectiveness of restricting gang activities. While some officials have pointed to marked decreases in juvenile crime, citizens have claimed that gangs simply move elsewhere. Interestingly, some police departments, including the LAPD, have opposed the imposition of some of the bans because of the difficulty in enforcement.¹⁰⁰ The court orders may require that each affected gang member be informed of the new order. Also, some of the restrictions apply only to persons with criminal records or require proof of intent to commit violence in order to ban gang members.¹⁰¹ These requirements are often difficult to enforce and result in an overall lack of enforcement.¹⁰²

VI. CONCLUSION

With the rise in street gangs, southern California has experienced a crisis in protecting the public. Local governments have instituted methods that stretch the outer limits of constitutionality. Unfortunately, neither new laws nor law enforcement techniques have significantly deterred gang violence. The gang books, sweeps, and bans have all failed to significantly curtail violent crimes. However, the tactics have injured innocent Californians and angered citizens who view the police as pursuing discriminatory and heavy-handed practices. To institute any more drastic action by law enforcement will require expanding the rights of police, limiting individual constitutional liberties and risking a public backlash.

Law enforcement in southern California appears able to only contain, not solve, gang violence. Therefore, the time has come to concentrate government resources on a long-term solution based on intervention. Communicating with young minorities at school, church, and the playground may provide the only avenue to terminating the senseless gang violence without surrendering constitutional rights.

⁹⁶ *Connally v. General Construction Company*, 269 U.S. 385, 390 (1926).

⁹⁷ *Zamora*, *supra* note 81, at B3; CAL PENAL § 186.20(f) (West 1993).

⁹⁸ *Plyler v. Doe*, 457 U.S. 202, 216-217 (1982).

⁹⁹ Strict scrutiny would not be required if the state had no intent to discriminate against minority youths. *Washington v.*, 426 U.S. at 239. This question is moot

since strict scrutiny is demanded by the abridgement of the First Amendment.

¹⁰⁰ McDonnell, *Plan to Ban Gangs From Parks Hit Home*, Los Angeles Times, May 17, 1993, at B1.

¹⁰¹ *Gang Bans—Be Careful How You Do It*, Los Angeles Times, May 7, 1993, at B6.

¹⁰² Ford and Lee, *Move to Ban Gangs from Parks Rejected*, Los Angeles Times, May 6, 1993, at Metro 1.