

## BLOOD IN, BUYOUT: A PROPERTY & ECONOMIC APPROACH TO STREET GANGS

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This article offers a fresh analysis of and solution to problems modern American street gangs present. Common wisdom dictates that, since they commit crimes, gangs should be understood and combatted through criminal sanctions. Popular interventions, like gang injunctions, expand that punitive orientation into civil strategies. But, gang criminality is merely a manifestation of a broader property-based disease. Therefore, those strategies will be ineffective and inefficient, as evidenced by the continuing rise in gang membership across the United States.

The consensus in gang research is that gangs are not crime syndicates; they are capitalist social institutions creating and operating in alternative markets. Violence and criminality are secondary or tertiary facets of gangs, resulting from the inaccessibility of mainstream markets. Integrating these findings into a unique synthesis of disparate threads of property theory—from Charles A. Reich’s *The New Property* and Margaret Jane Radin’s *Property and Personhood* to Cheryl I. Harris’ *Whiteness as Property*—it is clear that gangs’ primary purpose is to pursue the forms of property central to human identity. That insight frees anti-gang strategies from the strictures imposed by criminal law, but it also complicates the equation by revealing social justice considerations not normally associated with gangs.

From that foundation, this article presents a novel idea: Gangs are recreating a traditional market-based property system, so the approach to the problems associated with them should be market-inspired. In the market, actors are paid to induce desired behavior. Therefore, local governments should compensate gang members for nonparticipation in legal (but undesirable) gang activity. The article tests this proposal using Guido Calabresi and A. Douglas Melamed’s framework for allocating and protecting entitlements advanced in *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*. That analysis shows that the so-called “paid injunction” is a more effective and efficient approach to curbing the non-criminal activities of gangs that simultaneously advances the social justice concerns revealed by the property law analysis.

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*[P]eople are capable of violating a system which does not accept them, not so that they can live in anarchy but so that they can build a different system which respects a minimum of essential rights . . . . these rights are property rights.*

—Hernando de Soto<sup>1</sup>

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1. HERNANDO DE SOTO, THE OTHER PATH: THE INVISIBLE REVOLUTION IN THE THIRD WORLD 55 (June Abbott trans., 1989).

## PROLOGUE

Blood in. Blood out.<sup>2</sup> “The current . . . ethos equates joining a gang with losing one’s virginity. It’s a permanent state, and you can never go back . . . .”<sup>3</sup> The initiation is ruthless—“It was about 8 guys, they all just ganged up on me and started pounding down and if I made it through I was alright, if I died, I died.”<sup>4</sup> Resignation is lethal—“I was like ‘yo, man . . . I just can’t do this anymore.’ . . . So they was like either you get shot or you get stabbed . . . .”<sup>5</sup> This is the ominous specter of gang life disseminated by the media and law enforcement. This is the magnitude of the commitment promulgated through gang rhetoric. Blood in is, largely, true.<sup>6</sup> Blood out is not. Gang membership is often fluid, fleeting, or *pro tempore*.<sup>7</sup> The question, then, is not whether a gang member can be influenced to leave, but when and how?

## INTRODUCTION

This article advances a simple proposal: pay gang members to leave gangs.<sup>8</sup> That proposition will, almost universally, be perceived as politically, legally, and economically radical. But why should that be so? It is a truism in formally, nominally, and practically free market

2. The title of this article is a play on the, somewhat apocryphal, “blood in, blood out” rituals equated with gangs, according to which membership requires violent initiation (e.g., “jumping in,” or the physical beating of entrants by existing members) and violent exit procedures (including “jumping out” or death). See BLOOD IN, BLOOD OUT (Hollywood Pictures 1993). The title also uses the common investment term *buyout*, which refers to the process by which one company buys another. The term is associated with the leveraged buyout, popularly (mis)perceived as a predatory process that results in the destruction of the targeted company. It is used loosely here as evocative of the proposal offered in this paper; it is not a strict analogy.

3. JORJA LEAP, *JUMPED IN: WHAT GANGS TAUGHT ME ABOUT VIOLENCE, DRUGS, LOVE, AND REDEMPTION* 5 (2012).

4. Christian Bolden, *Tales from the Hood: An Emic Perspective on Gang Joining and Gang Desistance*, 38 CRIM. JUST. REV. 473, 478 (2013) (quoting “Southpaw,” a member of the Sureño street gang, concentrated in Southern California and present in thirty-five other states).

5. *Id.* at 485–86 (quoting “Bones,” a member of the Bloods street gang, founded in early 1970s Los Angeles, California, and diffused throughout the United States and Canada).

6. Dena C. Carson, Dana Peterson & Finn-Aage Esbensen, *Youth Gang Desistance: An Examination of the Effect of Different Operational Definitions of Desistance on the Motivations, Methods, and Consequences Associated With Leaving the Gang*, 38 CRIM. JUST. REV. 510, 512–14 (2013).

7. See, e.g., Gary Sweeten, David C. Pyrooz & Alex R. Piquero, *Disengaging from Gangs and Desistance from Crime*, 30 JUST. Q. 469, 493 (2013).

8. For a more complex and complete description of the proposal offered herein, see *infra* Part IV.B.3.

societies<sup>9</sup> that, if one wants to obtain or control a valued resource belonging to or controlled by someone else, then she should buy that resource or the right to control it.<sup>10</sup> Even the government, the only

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9. The use, here, of the phrase “free market society,” in contrast to “free market economy,” is purposeful. While the latter is a tool for organizing productive life, the former is a way of life in which “market values seep into every aspect of human endeavor” and “social relations are made over in the image of the market.” MICHAEL J. SANDEL, *WHAT MONEY CAN’T BUY: THE MORAL LIMITS OF MARKETS* 10–11 (2013) (“[W]ithout ever deciding to do so, we drifted from having a market economy to being a market society.”) (emphasis removed). The present author is actively engaged in interrogating not just the propriety of the shift from market economy to market society, like Sandel, but also the value, commitments, and implications of markets more broadly. See Lua Kamál Yuille, *Toward a Heterodox Property Law and Economics*, 2 TEX. A&M L. REV. 498 (2015) (proposing exploration of alternative economic approaches to property law that reject market centrality).

For an indirect defense of market society, see JASON BRENNAN & PETER JAWORSKI, *MARKETS WITHOUT LIMITS: MORAL VIRTUES AND COMMERCIAL INTERESTS* 10 (2016) (responding to critics of “commodification” with the argument that “if you may do it for free, you may do it for money”). Brennan and Jaworski, who address themselves to the philosophy discipline, also directly address Debra Satz and other leading critics of the market and commodification, in addition to Sandel. See, e.g., DEBRA SATZ, *WHY SOME THINGS SHOULD NOT BE FOR SALE: THE MORAL LIMITS OF MARKETS* (2010); ELIZABETH ANDERSON, *VALUE IN ETHICS AND ECONOMICS* (1993); MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* (1983). Within law, Margaret Jane Radin has led the critique of commodification. See MARGARET JANE RADIN, *CONTESTED COMMODITIES: THE TROUBLE WITH TRADE IN SEX, CHILDREN, BODY PARTS, AND OTHER THINGS* (1996) [hereinafter RADIN, *CONTESTED COMMODITIES*]; see also sources cited *infra* note 274.

10. This concept is so omnipresent that it demands no specific authority. However, its reflection is ubiquitous within relevant discourse. For example, the existence of a rich debate about the limits of market exchange, *supra* note 9, presupposes that market exchange—that is buying and selling coordinated, chiefly, through the price mechanism—is the default form of transaction. This is not to imply that, factually, all transactions occur within a market context or that, in free market societies, market exchange supplants all or most other forms of formal societal organization and exchange (i.e., total privatization, anarchy, or minarchy). Rather, embedded within the idea of market exchange is the concept of exchange, which Adam Smith argued was inherent in human nature. 1 ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 26 (London, Alex Murray & Co. 1872) (“Th[e] division of labour . . . is not originally the effect of any human wisdom . . . . It is the necessary . . . consequence of a certain propensity in human nature . . . the propensity to truck, barter, and exchange one thing for another.”). Smith’s intuition, it is widely believed, has been confirmed by the subsequent revelations of the study of evolution. See, e.g., HAIM OFEK, *SECOND NATURE: ECONOMIC ORIGINS OF HUMAN EVOLUTION* (2001) (arguing that the driver of human evolution is the innate trade skills); MATT RIDLEY, *RATIONAL OPTIMIST: HOW PROSPERITY EVOLVES* (2010); Stephen E. G. Lea & Paul Webley, *Money as Tool, Money as Drug: The Biological Psychology of a Strong Incentive*, 29 BEHAV. BRAIN SCI. 161, 162 (2006). (citing the long evolutionary history of exchange as the cause of psychological relations with money widely observed).

market actor<sup>11</sup> not generally subject to this market rule, must abide by it with respect to valued resources denominated “private property.”<sup>12</sup> Thus, common sense would render legitimate a compensation approach to the problem of street gangs. The Crips, the Bloods, the Latin Kings, and other contemporary American street gangs<sup>13</sup> have developed highly

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11. This does not mean that the government is *always* a market actor. For an interesting discussion of the government’s various roles with respect to markets, see Robert C. Hockett & Saule T. Omarova, “Private” Means to “Public” Ends: *Governments as Market Actors*, 15 THEORETICAL INQUIRIES L. 53 (2014).

12. U.S. CONST. amend. V (“nor shall private property be taken for public use, without just compensation”). For a discussion of the definition of property, see *infra* Part III.B.2.

13. For definitional, conceptual, and practical reasons, this article limits its discussion to contemporary U.S.-based street gangs. Analysis of U.S. prison gangs, like the notorious Aryan Brotherhood, organized criminal organizations (i.e., the mafia), international and transnational gangs, like MS-13 or Mara Salvatrucha, as well as other non-mainstream organizations engaged in criminal activity, is beyond the scope of the analysis here, and these phenomena fall outside the purview of the prescriptions offered in this article. Note, however, that existing studies tend to suggest that the arguments developed below would require significant modification to reflect the varied nature of these organizations and the vagaries of their engagement with capital and the forms of property of primary interest here. Traditional organized crime organizations, transnational gangs, and prison gangs are not, generally, territorial in the layman’s sense. Rather than physical spaces or even the constructed psychological spaces street gangs occupy, *see infra* Part III, these organizations seek to control higher level geographic territories, like distribution networks and specific illicit markets.

Emerging research on transnational gangs suggests violence and criminality may be more central to their function and that the influence of migratory patterns and immigration status on the development, proliferation, and persistence of these gangs may make the bridges to mainstream avenues of property identity production less effective and efficient. *See, e.g.*, TOM DIAZ, NO BOUNDARIES: TRANSNATIONAL LATINO GANGS AND AMERICAN LAW ENFORCEMENT 3 (2009) (suggesting that transnational gangs are “more sophisticated than old-style gangbangers, who . . . openly challenged society”); Scott H. Decker, Frank van Gemert & David C. Pyrooz, *Gangs, Migration, and Crime: The Changing Landscape in Europe and the USA*, 10 J. INT’L MIGRATION & INTEGRATION 393 (2009) (describing unique aspects of the emergence of transnational-type gangs); John P. Sullivan & Robert J. Bunker, *Third Generation Gang Studies: An Introduction*, 14 J. GANG RES., Summer 2007, at 1 (describing transnational gangs as a specific subset of complex gangs with “mercenary and at times political and potentially terrorist objectives”).

The study of prison gangs is also relatively new. However, several features also suggest that the prescriptions and analyses offered herein are inapposite. First, prison gang operations display high levels of sophisticated and targeted violence outside the competence of street gangs; the structure of these gangs, which tend to be led by individuals subject to the highest levels of carceral control makes it unlikely that market solutions can disrupt the organization or be attractive to their leadership; and the use of coercion and duress to force released prisoners to continue their association with the organizations make market mechanisms likely to be ineffective. *See, e.g.*, David Skarbek, *Governance and Prison Gangs*, 105 AM. POL. SCI. REV. 702 (2011); David Skarbek, *Prison Gangs, Norms, and Organizations*, 82 J. ECON. BEHAV. & ORG. 96 (2012).

valuable brands with market penetration rivaling multinational corporations, like McDonald's and Apple. Local governments and the communities they serve want to control, or destroy, those brands. A buyout is a perfectly reasonable response.

Of course, street gangs and their members are not run-of-the-mill market actors. The Federal Bureau of Investigation claims that gangs “poison our streets with drugs, violence, and all manner of crime.”<sup>14</sup> Gang narratives in news and political media paint a bleak, ominous, and fatalistic picture in which “brutal outlaws”<sup>15</sup> are killing the morals, culture, finances, and children of the communities they plague.<sup>16</sup> In response, local governments and law enforcement agencies have developed initiatives to disrupt and dismantle the reported 1.4 million gang members in 33,000 gangs across the country.<sup>17</sup> This experimentation aims at recapturing the successes of the order-maintenance era of policing and the social work era of gang control,<sup>18</sup> while abiding by the strictures imposed during the criminal procedure revolution and facing the funding realities of “law and order” politics. Most of this experimentation has focused on variations on traditional policing, like the creation of specialized “gang units” within police departments and targeted heightened surveillance operations against gang leaders. However, as the terroristic, modern image of the corporatized, mature, criminal street gang solidified in the

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Similarly, organized crime organizations, like the mafia, display unique features, particularly intra-organizational competition and violence, that suggest that the creation and reproduction of different kinds of property may be central to them. *See, e.g.*, JOSEPH L. ALBINI, *THE AMERICAN MAFIA: GENESIS OF A LEGEND* (1971) (suggesting the mafia arose as a means for members to increase traditional wealth and status); DIEGO GAMBETTA, *THE SICILIAN MAFIA: THE BUSINESS OF PRIVATE PROTECTION* (1993); THOMAS REPPETTO, *AMERICAN MAFIA: A HISTORY OF ITS RISE TO POWER* (2004). The decline of the American Mafia may be seen as evidence of the different types or intensity of identity property implicated by them. *Cf.* Peter Reuter, *The Decline of the American Mafia*, 120 PUB. INT., Summer 1995, at 89 (discussing the decline of the American Mafia without reference to identity property).

14. *Gangs*, FED. BUREAU OF INVESTIGATION, [http://www.fbi.gov/about-us/investigate/vc\\_majorthefts/gangs](http://www.fbi.gov/about-us/investigate/vc_majorthefts/gangs) (last visited Nov. 9, 2015).

15. ACLU FOUND. OF S. CAL., FALSE PREMISE/FALSE PROMISE: THE BLYTHE STREET GANG INJUNCTION AND ITS AFTERMATH 1 (1997) (quoting then-Los Angeles City Attorney James K. Hahn), <https://www.aclusocal.org/wp-content/uploads/2015/09/99227764-False-Premise-False-Promise.pdf>.

16. *See, e.g.*, Keasa Hollister, *Individual Autonomy Versus Community: Is It All or Nothing? An Analysis of City of Chicago v. Morales*, 28 PEPP. L. REV. 221 (2000); Arleen Jacobius, *Court Approves Gang Injunctions*, 83 A.B.A. J., April 1997, at 34.

17. *Gangs*, *supra* note 14.

18. Eva Rosen & Sudhir Venkatesh, *Legal Innovation and the Control of Gang Behavior*, 3 ANN. REV. L. & SOC. SCI. 255, 258 (2007).

1980s and 1990s, political actors increasingly turned to legal mechanisms to combat the growing, intractable menace.

Alternatively described as racist, draconian mallets that stamp on the Constitution to hammer out gangs and as innovative, precise drills that carve gang violence and crime from communities, public nuisance abatement actions (commonly known as gang injunctions) have become standard tools in the national gang strategy. These civil mechanisms enjoin the conduct and activities of the gangs themselves, preventing gang members from engaging in a panoply of otherwise legal activities, from displaying gang hand signals to congregating with other alleged gang members. Following the Supreme Court's 1999 disapprobation of Chicago's gang ordinance in *Chicago v. Morales*,<sup>19</sup> gang injunctions were exported from their birthplace in California to several jurisdictions across the country, including Texas, Utah, Minnesota, and Tennessee.<sup>20</sup>

The wholly criminal image of street gangs reflected in the punitive (and criminalizing) orientation of anti-gang legal mechanisms, like gang injunctions, is myopic and fatally flawed. Street gangs and their

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19. 527 U.S. 41, 51, 57, 64 (1999) (finding unconstitutionally vague an ordinance prohibiting gang members from loitering that failed to enumerate a comprehensive definition of "loiter" and left determination of gang membership to *ad hoc* police discretion). For a discussion of the mechanism at issue in *Morales* and relevant critiques, see, for example, Debra Livingston, *Gang Loitering, the Court, and Some Realism About Police Patrol*, 1999 SUP. CT. REV. 141, 162; Tracey L. Meares & Dan M. Kahan, *The Wages of Antiquated Procedural Thinking: A Critique of Chicago v. Morales*, 1998 U. CHI. LEGAL F. 197; Albert W. Alschuler & Stephen J. Schulhofer, *Antiquated Procedures or Bedrock Rights?: A Response to Professors Meares and Kahan*, 1998 U. CHI. LEGAL F. 215; Lawrence Rosenthal, *Gang Loitering and Race*, 91 J. CRIM. L. & CRIMINOLOGY 99 (2000); 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 (2002). The U.S. Supreme Court has not considered gang injunctions, but, as imposed in California, it is clear that they are distinguishable from the Chicago ordinance with respect to the constitutional infirmities considered in *Morales*. 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, 51-53 (1999). But see Ryan Young, *Sharpen the Blade: Void for Vagueness and Service of Process Concerns in Civil Gang Injunctions*, 40 MCGEORGE L. REV. 1001, 1004, 1013 (2009).

20. See MATTHEW D. O'DEANE, *GANG INJUNCTIONS AND ABATEMENT: USING CIVIL REMEDIES TO CURB GANG-RELATED CRIMES* 441-49 (2011).

Even the United Kingdom has begun actively experimenting with the mechanisms, Dominic Casciani, *Gang Injunctions Launched in England and Wales*, BBC NEWS (Jan. 31, 2011), [www.bbc.com/new/uk-12311184](http://www.bbc.com/new/uk-12311184); *Gang Injunctions: Problem or Solution?*, MAKING CONTACT (Dec. 13, 2011), [www.radioproject.org/2011/12/gang-injunctions-problem-or-solution/](http://www.radioproject.org/2011/12/gang-injunctions-problem-or-solution/), and gang injunction legislation has been proposed in Guatemala, Juan J. Fogelbach, *Gangs, Violence, and Victims in El Salvador, Guatemala, and Honduras*, 12 SAN DIEGO INT'L L.J. 417, 450 (2011).

constituent members *do* engage in unlawful and criminal conduct.<sup>21</sup> However, the consensus across the varied fields engaged in gang research is that contemporary gangs do not exist in order to commit crime. Violence and criminality are secondary or tertiary characteristics of gangs necessitated by the inaccessibility of mainstream markets and the legal mechanisms that structure those markets.<sup>22</sup> Rather, properly interpreted, they are essentially capitalist social institutions creating and operating in alternative markets for social and financial capital. Simply put, street gangs are black market corporations.<sup>23</sup> That does not make them any less objectionable.<sup>24</sup> But it does suggest that a logical approach to gangs should reflect this reality.

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21. See, e.g., David C. Pyrooz, *From Colors and Guns to Caps and Gowns? The Effects of Gang Membership on Educational Attainment*, 51 J. RES. CRIME & DELINQ. 56, 57 (2014) (summarizing some current research concluding the same).

22. This same idea has been explored in depth with respect to pirates. See PETER T. LEESON, *THE INVISIBLE HOOK: THE HIDDEN ECONOMICS OF PIRATES* (2011). Working largely within the Austrian orientation to economics, Leeson concludes from his analysis of pirates that government mechanisms are unnecessary to create and support robust markets. Perhaps because he identified considerable fluidity among the mainstream and pirate market, he fails to address what kind of mechanisms would be proper to create a bridge from the alternative pirate markets to the mainstream market of the day (which would have been privateering). The creation of such bridges constitutes the positive goal of this article.

23. While the analogy is imperfect and loose, it is also apt. This parallel will be explored in depth in a future article. However, as is relevant here, it serves to highlight that the analogy does not intend to imply that gangs are created by or given the imprimatur of legitimacy by the state. Nor does it suggest that gangs, routinely, have formalized governance structures typically required by jurisdictional incorporation laws. *But see* Steven D. Levitt & Sudhir Alladi Venkatesh, *An Economic Analysis of a Drug-Selling Gang's Finances*, 115 Q. J. ECON. 755, 761–69 (2000) (suggesting that the Chicago gangs were highly formalized). Rather, this analogy draws on the notion that the corporation is merely one way individuals unite to pursue capital. See Lewis D. Solomon & Kathleen J. Collins, *Humanistic Economics: A New Model for the Corporate Social Responsibility Debate*, 12 J. CORP. L. 331, 338 (1987); Brynna Nelson Swenson, *The Corporate Form: Capital, Literature, Architecture* (June 2008) (unpublished Ph.D. dissertation, University of Minnesota) (defining the corporate form as a structure for collective action). In this sense, typical gangs are unequivocally “firms,” as that term has been used in the literature for centuries. However, it is more like a corporation than a partnership as it displays features reminiscent of core features of the corporate form, including a version of the separation of ownership and control, limited liability, and perpetual existence.

24. The present article illustrates that, rightly understood, gangs produce significant private and social benefits not being provided by the societal institutions that traditionally provide such benefits. See *infra* Part III.B.1. Nevertheless, not only due to negative externalities associated with the production of these benefits, no serious sustained academic or political analysis of gangs suggests that as societal institutions gangs should be accepted. *But see*, JOHN M. HAGEDORN, *A WORLD OF GANGS: ARMED YOUNG MEN AND GANGSTA CULTURE* (2008) (arguing that gangs are sustained by the effects of globalization and suggesting engaging gangs in the process of transforming the institutional, economic, and political antecedents key to their existence); Caspar

This article provides the foundation for one such logical approach, offering a novel solution to the problems purportedly addressed by gang injunctions. A more nuanced rendition of the normative (hypo)thesis rudimentarily introduced above is this: local governments should compensate gang members for refraining from certain, otherwise lawful, gang activity. The gang buyout (hypo)thesis rests on a two-tiered foundation, one descriptive and one prescriptive.

The descriptive claim of the article is that gangs are about not crime, but property. Properly cast, it is clear that the idea of property is central to understanding the behavior targeted by gang injunctions, as well as the strategies being used to combat that behavior. The political justifications and practical modalities of gang injunctions focus on the harm gangs inflict on third-party property interests, employing the hybrid property/tort paradigm of nuisance law to remedy that harm. At the same time, setting aside stereotypical criminal conduct, a key function of the contemporary gang is the creation, use, and control of property. Gangs control territory; they communicate through the use of clothing and other heraldic devices; they create intangible assets (capital akin to goodwill) on which they trade. These kinds of property are not merely income generators. Rather, they are connected to and necessary for human identity. That insight frees anti-gang strategies from the confines of the criminal law matrix, but it complicates matters by exposing social justice considerations not normally associated with gangs.

Building on that descriptive base, the article draws on the normative insights of law and economics scholarship to show that legal mechanisms that approach gangs as inescapably criminal are likely to be ineffective and inefficient. Gangs are recreating a traditional market-based property system, so the approach to the problems associated with them should be market-inspired. In the market, actors are paid to induce desired behavior. A gang compensation strategy replicates this market outcome in the gang context and could form part of an efficient comprehensive attack on gangs that is equally responsive to economic rationality, broad social justice concerns, and the crime control imperative.

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Walsh, *Gangs Are Good for Society*, GUARDIAN (Nov. 10, 2011, 5:00 AM), <http://www.theguardian.com/society/joepublic/2011/nov/10/gangs-good-society-youth-crime> (suggesting that gangs are good for society, with the caveat that criminogenic tendencies of gangs must be redirected); JOHN M. HAGEDORN, *A WORLD OF GANGS: ARMED YOUNG MEN AND GANGSTA CULTURE* (2008) (arguing that gangs are sustained by the effects of globalization and suggesting engaging gangs in the process of transforming the institutional, economic, and political antecedents key to their existence).

Part I of this article presents a history and anatomy of the gang injunction that provides a foundation for both the criminological and property approaches to gangs. Part II reviews the primary analytical frames of gang injunction discourse to show how the prevailing criminal image of gangs has resulted in a political and rhetorical stalemate. Part III suggests that a property law frame is rhetorically, formally, and remedially important to efficiently and effectively addressing the behaviors targeted by gang injunctions. It shows that the primary objective of gangs is the creation of capital for its members. To demonstrate this claim, the article draws together several disparate threads of influential, contemporary property theory, including Charles A. Reich's *The New Property*,<sup>25</sup> Margaret Jane Radin's *Property and Personhood*,<sup>26</sup> Cheryl I. Harris' *Whiteness as Property*,<sup>27</sup> and Eduardo Moisés Peñalver and Sonia K. Katyal's *Property Outlaws*.<sup>28</sup> This synthesis illustrates that the capital gangs create and pursue should be treated as the kind of property long recognized central to human identity and, therefore, commanding greater deference.

With the property dimension properly centered, Part IV analyzes gang injunctions using the economically grounded conceptual framework of property rules, liability rules, and inalienability suggested by Guido Calabresi and A. Douglas Melamed in *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*.<sup>29</sup> The application of that analysis leads directly to the proposal that local governments wishing to eliminate criminogenic (though not criminal) gang activity from the communities in which gangs are situated should obtain injunctions prohibiting that otherwise legal conduct, but they should also indemnify or compensate the enjoined gangs member through non-monetary means for the cost of refraining from that conduct. Part IV concludes by surveying the results of a private program that reflects the principles of such a compensated injunction to suggest that practical economic considerations provide support for a "compensated gang injunction."

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25. Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

26. Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

27. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709 (1993).

28. Eduardo Moisés Peñalver & Sonia K. Katyal, *Property Outlaws*, 155 U. PA. L. REV. 1095, 1132–33 (2007).

29. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

## I. A BRIEF HISTORY OF GANGS AND GANG INJUNCTIONS

The circumstances leading to California's introduction of the gang injunction contextualize the ideas presented here. The general path is easy to trace. Gang injunctions are the result of the convergence of legal, economic, and socio-political factors that simultaneously caused the proliferation of hyper-violent, institutionalized, and increasingly organized gangs and fostered the inability of public and private socio-cultural institutions to prevent, dismantle, and mitigate them. The discussion that follows briefly revisits the key landmarks along the path.

A. *The Emergence of Contemporary Gangs*

The origins of the modern street gang are complex and highly contested, but three cross-pollinated and cyclically reinforcing factors dominate causal analyses in both academic and popular discourse: (1) the impact of the post-industrial era in working class urban and suburban minority communities; (2) the introduction and popularization of crack cocaine; and (3) the opportunistic evolution of street gangs.<sup>30</sup>

The correlation among economic disadvantage, crime, and social problems has been established and analyzed in a voluminous academic literature.<sup>31</sup> In the 1960s and 1970s, a new wave of such disadvantage coursed through the minority, transitional, and marginalized communities that were the historical incubators of delinquent gangs.<sup>32</sup> In the post-World War II era, steady, unionized, blue-collar employment in thriving manufacturing industries provided a financial infrastructure that paved and sustained organic avenues out of delinquency for maturing young adults and indirectly supported civic and private social institutions.<sup>33</sup> The stability engendered by economic opportunity was eroded as the labor market steadily contracted

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30. John M. Hagedorn, *Race Not Space: A Revisionist History of Gangs in Chicago*, J. AFR. AM. HIST. 194, 201–05 (2006).

31. See, e.g., Judith R. Blau & Peter M. Blau, *The Cost of Inequality: Metropolitan Structure and Violent Crime*, 47 AM. SOC. REV. 114, 121–23 (1982); Jane D. McLeod, James M. Nonnemaker & Kathleen Thiede Call, *Income Inequality, Race, and Child Well-being: An Aggregate Analysis in the 50 United States*, 45 J. HEALTH & SOC. BEHAV. 249 (2004); E. Britt Patterson, *Poverty, Income Inequality, and Community Crime Rates*, 29 CRIMINOLOGY 755, 755–76 (1991); James A. Piazza, *Poverty, Minority Economic Discrimination, and Domestic Terrorism*, 48 J. PEACE RES. 339, 348 (2011).

32. See, e.g., Josh Sides, *Straight into Compton: American Dreams, Urban Nightmares, and the Metamorphosis of a Black Suburb*, 56 AM. Q. 583, 593–94 (2004).

33. *Id.* at 584, 588–89.

beginning in the 1960s and precipitously evaporated in the late 1970s and early 1980s, as industries fled urban areas to American suburban and, in greater numbers, attractive foreign lower wage markets.<sup>34</sup>

The social fabric, weakened by the economic assault of urban deindustrialization, was further strained by the return of cocaine to underclass communities. Illicit drugs and drug abuse are not novel or unique features of contemporary society, including the urban underclass, but during the 1970s, cocaine was considered a luxury vice accessible only to celebrities.<sup>35</sup> In the early 1980s, drug traffickers introduced a new form of the drug, now well known as “crack cocaine,” that was convenient, fast acting, intense, and very inexpensive.<sup>36</sup> By 1986, when legislation was first introduced specifically targeting it,<sup>37</sup> crack cocaine had evolved from a drug predominantly abused by White, middle class adolescents to the drug of choice for the minority underclass.<sup>38</sup> The affordability of crack cocaine to poor minority consumers, bolstered by its ease of production and addictiveness,<sup>39</sup> transformed the illicit drug market into an accessible and seemingly sustainable McDonald’s industry to replace closed legitimate labor market opportunities for “at risk” urban youth.<sup>40</sup>

Like economic disadvantage and drugs, the street gang is not a new feature of the American urban ecology, tracing its origins to as early as the eighteenth century<sup>41</sup> and remaining prevalent in ethnic and

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34. *Id.* at 591–93.

35. *See, e.g.*, Janet L. Dolgin, *The Law’s Response to Parental Alcohol and “Crack” Abuse*, 56 BROOK. L. REV. 1213, 1222–24 (1991); Richard Dvorak, *Cracking the Code: “De-Coding” Colorblind Slurs During the Congressional Crack Cocaine Debates*, 5 MICH. J. RACE & L. 611, 647 (2000) (citing James A. Inciardi, *Beyond Cocaine: Basuco, Crack and Other Coca Products*, 14 CONTEMP. DRUG PROBS. 461, 463–64 (1987)); Jeff Grogger & Michael Willis, *The Emergence of Crack Cocaine and the Rise in Urban Crime Rates*, 82 REV. ECON. & STAT. 519, 526–28 (2000).

36. Dvorak, *supra* note 35, at 649; Jeffery Fagan & Ko-lin Chin, *Initiation into Crack and Powdered Cocaine: A Tale of Two Epidemics*, 16 CONTEMP. DRUG PROBS. 579, 579–81 (1989).

37. *See e.g.*, Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended in scattered sections of 21 U.S.C.); *see also* A. Morgan Cloud, III, *Cocaine, Demand, and Addiction: A Study of the Possible Convergence of Rational Theory and National Policy*, 42 VAND. L. REV. 725, 776 (1989).

38. Dvorak, *supra* note 35, at 649–50; Christo Lassiter, *The Stop and Frisk of Criminal Street Gang Members*, 14 NAT’L BLACK L.J. 1, 22 n.86 (1995); William Spade, Jr., *Beyond the 100:1 Ratio: Towards A Rational Cocaine Sentencing Policy*, 38 ARIZ. L. REV. 1233, 1278 (1996).

39. Dvorak, *supra* note 35, at 649–51.

40. *See, e.g.*, Jeffery Fagan, *The Social Organization of Drug Use and Drug Dealing Among Urban Gangs*, 27 CRIMINOLOGY 633, 633–35 (1989).

41. *See, e.g.*, MARTIN SANCHEZ JANKOWSKI, ISLANDS IN THE STREET: GANGS AND AMERICAN URBAN SOCIETY 1 (1991); Jeffrey Fagan, *Gangs, Drugs, and*

transitional communities throughout the nineteenth and twentieth centuries.<sup>42</sup> As first described by Frederic Thrasher in the 1920s<sup>43</sup> and enriched by theorists working in the Chicago School of Sociology over the next thirty years, gangs were a natural, interstitial feature of adolescence in predominantly poor, White ethnic enclaves that was solidified through conflict and led to integration in mainstream social institutions.<sup>44</sup> This image persisted as the predominant view of gangs until the 1970s. By that time, the typical gang was “made up largely of darker-hued ethnic groups, especially African Americans and Latino Americans,”<sup>45</sup> which was an important departure from but consistent with the Chicago School’s model of gangs. However, its nature changed drastically in the latter quarter of the twentieth century.<sup>46</sup>

Although the causes are complex, deindustrialization and crack cocaine were important drivers of this change.<sup>47</sup> Alienation from legitimate labor markets caused by emigration of ecologically sustaining manufacturing industries distorted established gang attrition patterns associated with the end of adolescence.<sup>48</sup> As a result, gangs institutionalized and lost their interstitial character.<sup>49</sup> This evolution (or devolution) was, in turn, a factor in the widespread adoption of economic functions by gangs,<sup>50</sup> now dominated by the older youth and young adults who failed to naturally attrite.<sup>51</sup> Though commentators

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*Neighborhood Change*, in *GANGS IN AMERICA* 39, 39 (C. Ronald Huff ed., 2d ed. 1996).

42. JANKOWSKI, *supra* note 41.

43. FREDERIC M. THRASHER, *THE GANG: A STUDY OF 1,313 GANGS IN CHICAGO* (1927).

44. *Id.*; see John M. Hagedorn, *Gang Violence in the Post-Industrial Era*, in 24 *CRIME & JUSTICE: A REVIEW OF RESEARCH* 365, 369 (Michael Tonry & Mark H. Moore eds., 1998) [hereinafter Hagedorn, *Gang Violence*] (listing the studies of gang activity); Louis Holland, *Can Gang Recruitment Be Stopped? An Analysis of the Social and Legal Factors Affecting Anti-gang Legislation*, 21 *J. CONTEMP. L.* 259, 267 (1995); James Diego Vigil, *Urban Violence and Street Gangs*, 32 *ANN. REV. ANTHROPOLOGY* 225, 225 (2003).

45. Vigil, *supra* note 44, at 225.

46. *Id.* at 225–28.

47. See, e.g., John M. Hagedorn, *Gangs as Social Actors*, in *THE ESSENTIAL CRIMINOLOGY READER* 141 (Stuart Henry & Mark M. Lanier eds., 2006); Hagedorn, *Gang Violence*, *supra* note 44.

48. John M. Hagedorn, *Gangs in Late Modernity*, in *GANGS IN THE GLOBAL CITY: ALTERNATIVES TO TRADITIONAL CRIMINOLOGY* 295 (John M. Hagedorn ed., 2007) [hereinafter Hagedorn, *Gangs in Late Modernity*].

49. *Id.* at 308.

50. See, e.g., SCOTT CUMMINGS & DANIEL J. MONTI, *GANGS: THE ORIGINS AND IMPACT OF CONTEMPORARY YOUTH GANGS IN THE UNITED STATES* (1993) (using the term *entrepreneurial*); FELIX PADILLA, *THE GANG AS AN AMERICAN ENTERPRISE* (1992); CARL S. TAYLOR, *DANGEROUS SOCIETY* 4, 7–8 (1989) (using the term *corporate*).

51. Hagedorn, *Gang Violence*, *supra* note 44.

generally agree that media and law enforcement overstate its scope,<sup>52</sup> gang entrepreneurialism capitalized on the accessibility of the potentially lucrative and vastly expanded new drug market.<sup>53</sup> The increasingly “corporatized” and capitalist gang progressively engaged in violence to regulate its illicit commercial pursuits,<sup>54</sup> a development that supported and was exacerbated by the proliferation of firearm use.<sup>55</sup>

Epitomized by the Crips and Bloods of Los Angeles,<sup>56</sup> contemporary gangs represented a socio-economic crisis in underclass, minority communities that posed unique challenges due to political and legal developments that emerged in the same periods.<sup>57</sup> First, revised funding commitments responsive to the retrenchment of the welfare state beginning in the 1970s led to the retreat from and eventual abandonment of the “human services” or “social work” approach to gang intervention, which sought to (re-)integrate delinquent youth into mainstream social institutions by connecting them with education and employment opportunities.<sup>58</sup> At the same time, the discretion of order-maintenance policing strategies<sup>59</sup> had been largely limited due to

52. See, e.g., MALCOLM W. KLEIN, *THE AMERICAN STREET GANG: ITS NATURE, PREVALENCE, AND CONTROL* (1995); James C. Howell, *Menacing or Mimicking? Realities of Youth Gangs*, 58 JUV. & FAM. CT. J. 39 (2007).

53. Levitt & Venkatesh, *supra* note 23, at 755–56.

54. JAMES C. HOWELL & SCOTT H. DECKER, U.S. DEP’T OF JUSTICE, *THE YOUTH GANGS, DRUGS, AND VIOLENCE CONNECTION* (1999), [www.ncjrs.gov/pdffiles1/93920.pdf](http://www.ncjrs.gov/pdffiles1/93920.pdf); Malcolm W. Klein, Cheryl L. Maxson & Lea C. Cunningham, “Crack,” *Street Gangs, and Violence*, 29 CRIMINOLOGY 623, 625–26 (1991).

55. See, e.g., Beth Bjerregaard & Alan J. Lizotte, *Gun Ownership and Gang Membership*, 86 J. CRIM. L. & CRIMINOLOGY 37 (1995).

56. “The competition between the Bloods and the Crips has assumed almost legendary status.” Joan W. Howarth, *Representing Black Male Innocence*, 1 J. GENDER RACE & JUST. 97, 109 (1997) (citing IRVING SPERGEL, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, *GANG SUPPRESSION AND INTERVENTION: AN ASSESSMENT* 33 (1993)). For a description of these notorious gangs, see for example ALEJANDRO A. ALONSO, *TERRITORIALITY AMONG AFRICAN AMERICAN STREET GANGS IN LOS ANGELES* (1999); R. D. Flores, *Crips and Bloods*, 13 CRIME & JUST. INT’L 6, 6–9 (1997).

57. For one account of these developments—described as “backlash” and a “failed experiment”—see Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165 (1996).

58. Irving A. Spergel, *Youth Gangs: An Essay Review*, 66 SOC. SERV. REV. 121, 121–22 (1992). See generally CHRISTOPHER PIERSON, *After the ‘Golden Age’: From ‘Crisis’ Through ‘Containment’ to ‘Structural Adjustment,’* in BEYOND THE WELFARE STATE?: THE NEW POLITICAL ECONOMY OF WELFARE 135, 135–66 (2d ed. 1998).

59. So-called “order-maintenance policing” is characterized by the broad delegation of discretionary power to local police to “keep the peace” (read: enforce community norms of decency and aesthetics) through a constellation of tools that include the informal exercise of authority, as well as the power to arrest individuals for

changes in policing theory hastened by the constitutional “criminal procedure revolution” of Earl Warren’s Supreme Court.<sup>60</sup> As a result, social workers were no longer available to counsel youth away from gangs and police could no longer preemptively address gang delinquency through legally indiscriminate (often discriminatory)<sup>61</sup> arrests of adolescent and young adult males. Finally, changes in political proclivities led to strict prescriptions of responsibility and accountability and the concomitant adoption of increasingly severe punitive models of law enforcement.<sup>62</sup> These changes frustrated all efforts to suppress and police gangs.<sup>63</sup>

With social and criminal approaches deemed impracticable and ineffective, the gang problem appeared intractable. Voices in popular media, politics, and law enforcement sounded that message.<sup>64</sup>

### B. Using Civil Law to Combat Crime

In the 1980s and 1990s, the socio-economic and politico-legal phenomena that induced the crises of the contemporary gang presented themselves most acutely in the largest metropolises, which clambered to develop approaches responsive to the novelty of modern gangs. Naturally, the first new legal mechanisms developed to control gangs were criminal in nature. The City of Chicago was in the vanguard of such efforts. Its anti-gang loitering ordinance, which prohibited gang

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relatively minor offenses (e.g., “breaching the peace,” “suspicion,” loitering, and vagrancy) that exist at least primarily to provide the police with tools to remove undesirable persons from public spaces. See Nicole Stelle Garnett, *Ordering (and Order in) the City*, 57 STAN. L. REV. 1, 7–8 (2004).

60. For a property perspective on this revolution, see Ellickson, *supra* note 57, at 1219–26. See generally Garnett, *supra* note 59.

61. Lawrence Rosenthal, *Policing and Equal Protection*, 21 YALE L. & POL’Y REV. 53, 55–56 (2003) (noting this perception); BERNARD E. HARCOURT, *ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING* 166–79 (2001); David Cole, *Foreword: Discretion and Discrimination Reconsidered—A Response to the New Criminal Justice Scholarship*, 87 GEO. L.J. 1059, 1074–82 (1999); Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775, 799–818 (1999).

62. See, e.g., Fagan & Chin, *supra* note 36; Hagedorn, *Gang Violence*, *supra* note 44; *Notes from the Field: Challenges of Indigent Criminal Defense*, 12 N.Y. CITY L. REV. 203, 230 (2008).

63. See, e.g., David R. Truman, *The Jets and Sharks are Dead: State Statutory Responses to Criminal Street Gangs*, 73 WASH. U. L. Q. 683 (1995).

64. Even then—Los Angeles police chief Daryl F. Gates, the man at the *de facto* helm of the nation’s anti-gang efforts, was at a loss. He is quoted as having said, “It is my belief we don’t know a helluva lot about gangs. I don’t know what the hell to do about it as a matter of fact.” Susan L. Burrell, *Gang Evidence: Issues for Criminal Defense*, 30 SANTA CLARA L. REV. 739, 739 (1990).

members from loitering in public places,<sup>65</sup> remains the highest profile anti-gang strategy to have been implemented using legal tools, and the idea continues to receive attention as a potentially effective part of the law enforcement arsenal more than a decade after the Supreme Court declared the ordinance unconstitutionally vague.<sup>66</sup>

Dubiously distinguished as the epicenter of the modern gang epidemic,<sup>67</sup> the city of Los Angeles and the state of California have, by necessity, been the standard-bearers of gang control experimentation. The California Street Terrorism Enforcement and Prevention (STEP) Act,<sup>68</sup> which not only criminalizes gang participation but also permits enhancements for more than thirty felonies when committed by a gang member,<sup>69</sup> is frequently recognized as inaugurating the trend of finding novel ways to use the law against gangs. However, well before the STEP Act's initial passage in 1988, California jurisdictions began utilizing civil legal mechanisms to address its gang problems. After forming the first specialized anti-gang police units in 1978, Los Angeles County and City officials (and their counterparts in Orange County) began experimenting with civil approaches to gangs.<sup>70</sup>

The original gang injunction was the "single situs" property abatement.<sup>71</sup> These temporally limited, highly specific, and geographically narrow injunctions target one location (generally a private residence) as a nuisance because it serves as a gang activity

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65. For an evaluative description of the ordinance, see *supra* note 19.

66. For the most recent discussion, see Kathryn Kizer, *Behind the Guise of Gang Membership: Ending the Unjust Criminalization*, 5 DEPAUL J. FOR SOC. JUST. 333, 348-49 (2012); Jane Penley, *Urban Terrorists: Addressing Chicago's Losing Battle with Gang Violence*, 61 DEPAUL L. REV. 1185 (2012).

67. C. Ronald Huff, *Gangs in the United States*, in THE GANG INTERVENTION HANDBOOK 3, 7-13 (Arnold P. Goldstein & C. Ronald Huff eds., 1993).

68. CAL. PENAL CODE §§ 186.20-.34 (West 2014).

69. §§ 186.21, 654. (West 2010).

70. CHERYL L. MAXSON, KAREN HENNIGAN, DAVID SLOANE & KATHY A. KOLNICK, CAN CIVIL GANG INJUNCTIONS CHANGE COMMUNITIES? A COMMUNITY ASSESSMENT OF THE IMPACT OF CIVIL GANG INJUNCTIONS 3 (2004) [hereinafter MAXSON ET AL., COMMUNITY ASSESSMENT], <https://www.ncjrs.gov/pdffiles1/nij/grants/208345.pdf> (citing DEANNE CASTORENA, THE HISTORY OF THE GANG INJUNCTION IN CALIFORNIA (1998) (unpublished report by the Hardcore Gang Division, Office of the District Attorney, County of Los Angeles)).

71. *Id.* For a detailed review of the program in place in Southern California, see JONATHAN CRISTALL & LIORA FORMAN-ECHOLS, L.A. CITY ATTORNEY'S OFFICE, PROPERTY ABATEMENTS—THE OTHER GANG INJUNCTION: PROJECT T.O.U.G.H. (2009), <https://www.nationalgangcenter.gov/content/documents/project-tough.pdf>. Single-situs public-nuisance lawsuits have also been promoted and wielded to address other problems generally associated with criminal law. See Garnett, *supra* note 59, at 20 (discussing prostitution and drug trafficking).

hub.<sup>72</sup> Pursuant to a gang property abatement action, specific gang members and gang associates are subject to “stay away” orders prohibiting them from returning to the tortfeasing property, and the owners, managers, and tenants of the tortfeasing property are required to take comprehensive proactive measures to prevent gang activity at the property.<sup>73</sup> Orange County obtained the first such injunction in 1980,<sup>74</sup> and more than three hundred are reported to have been filed during the two-year period before local governments began targeting directly gangs and their territories.<sup>75</sup>

Officials reported that gang property abatement actions were highly successful,<sup>76</sup> but they cast an insufficiently wide net. So, in July 1982, the Los Angeles City Attorney obtained a broader temporary restraining order targeting gang graffiti and graffiti-related acts.<sup>77</sup> Seventy-two members of three gangs were named and ordered to remove their own graffiti.<sup>78</sup> More important, the gangs themselves were also certified as unincorporated associations and named in the action.<sup>79</sup> A tentative and discreet law enforcement revolution had begun.

Five years later, city officials returned to the courts seeking even broader injunctive relief, prohibiting the Playboy Gangster Crips from engaging in a wide range of legal and illegal conduct anywhere in the City of Los Angeles.<sup>80</sup> As eventually granted,<sup>81</sup> the injunction against the Playboy Gangster Crips made big headlines but little waves. Nonetheless, empowered by the promise of the new weapon, experimentation continued.<sup>82</sup> By the mid-1990s, broad nuisance abatement actions were being deployed against gangs to target conduct not otherwise prohibited in the California Penal Code.<sup>83</sup> The lessons learned therefrom resulted in an unofficial model gang injunction that is

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72. CRISTALL & FORMAN-ECHOLS, *supra* note 71, at 4–6.

73. *Id.* at 5–6.

74. O’DEANE, *supra* note 20, at 317.

75. *Id.*

76. *Id.* at 317–18.

77. *Id.* at 318.

78. *Id.*

79. *Id.*

80. *Id.* at 320.

81. The judge struck all provisions that limited acts not otherwise prohibited by the California Penal Code and limited the scope to a twenty-six square block area (in which the police claimed to have made more than five hundred arrests in the year following the injunction). *Id.* at 320–21.

82. *Id.* at 323. One satellite Los Angeles city even hired a private law firm to structure its injunction. *Id.*

83. EDWARD L. ALLAN, CIVIL GANG ABATEMENT: THE EFFECTIVENESS AND IMPLICATIONS OF POLICING BY INJUNCTION 63–67 (2004).

now used throughout California and has served as the template for gang injunctions and statutes domestically and internationally.<sup>84</sup>

### C. Gang Injunction Structure

As tools for ordering civil society, gang injunctions are a pedestrian legal remedy, but they are distinctive in the arsenal of gang prevention and criminal law enforcement.<sup>85</sup> The structure of a typical California gang injunction demonstrates why this distinctiveness makes gang injunctions attractive.

In their standard form, gang injunctions apply the law of nuisance to gang activity, claiming that the conduct of a gang (named as an unincorporated organization) constitutes a public nuisance under California law, which has both civil and penal components. As a civil offense, “[a]nything which is injurious to health . . . or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property . . .” constitutes a nuisance.<sup>86</sup> A nuisance becomes public when it “affects at the same time an entire community or neighborhood or any considerable number of persons,”<sup>87</sup> and it becomes criminal when it has a “distinctively public quality.”<sup>88</sup> As a practical matter, the key components of gang injunctions are the demarcation of the neighborhood or community affected by the alleged public nuisance, the enumeration of the conduct constituting the alleged nuisance, and the identification of the responsible gang.<sup>89</sup>

Outlining the geographic area in which a gang will be enjoined is, generally, simple. The “safety” or target zone is normally co-extensive with all or the core of a gang’s claimed or functional territory.<sup>90</sup> So too is defining the nuisance. As popularly understood, all of the collective and individual public conduct of gang members falls within the expansive ambit of the statutory public nuisance definition. This corpus

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84. O’DEANE, *supra* note 20, at 441–49; Casciani, *supra* note 20; *Gang Injunctions: Problem or Solution?*, *supra* note 20.

85. Cheryl L. Maxson, Karen Hennigan & David C. Sloane, *For the Sake of the Neighborhood? Civil Gang Injunction as a Gang Intervention Tool in Southern California*, in *POLICING GANGS AND YOUTH VIOLENCE* 260–61 (Scott H. Decker ed., 2003) (detailing the ways the mechanism defies simple categorization).

86. CAL. CIV. CODE § 3479 (2015) (specifically including drug dealing).

87. CAL. CIV. CODE § 3480 (West 2012 & Supp. 2015).

88. CAL. PENAL CODE § 370 (West 2010 & Supp. 2015).

89. *See, e.g.*, MAX SHINER, NAT’L DIST. ATTORNEYS ASS’N, *CIVIL GANG INJUNCTIONS: A GUIDE FOR PROSECUTORS* 21–24 (2009).

90. *Id.* at 22–24.

of “everything” is precisely the target of a gang injunction.<sup>91</sup> In addition to redundantly prohibiting a comprehensive range of conventional illegal and criminal gang conduct (i.e., the sale of controlled substances, robberies, assaults, and homicides), injunctions routinely catalog a wide, almost absolute, range of otherwise lawful conduct in which gang members are believed to engage, including the following:

- (1) standing, sitting, walking, driving, gathering, or otherwise appearing in the public view with any known gang member;
- (2) possessing tools or objects capable of defacing real or personal property (e.g., pens, spray paint container);
- (3) knowingly being present in a vehicle found to have contraband, drugs or illegal weapons;
- (4) using words, phrases, physical gestures or symbols, or engaging in other forms of communication that describe or refer to the gang;
- (5) wearing gang clothes; and
- (6) making loud noise of any kind at any time of day or night.<sup>92</sup>

Satisfactorily indicating the parties responsible for the alleged gang nuisance to be named in the abatement suit is a more complicated task because gangs are informal institutions that operate on the margins of recognized organizational norms.<sup>93</sup> California localities overcome this obstacle using the “time-honored equitable practice applicable to labor unions, abortion protestors or other identifiable groups”<sup>94</sup> of pursuing equitable remedies against identifiable groups (regardless of their incorporation status) because “such groups can act only through the medium of their membership.”<sup>95</sup> To affect this principle, at least some specific gang members are named as representatives of the named gang.<sup>96</sup>

Once the injunction is entered, it runs to the *classes* of people through whom the gang may act. In something of a legal fiction, a gang injunction binds not only *all* active members of a gang, but also gang affiliates and associates that may directly or indirectly support the gang,

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91. *See id.* at 38.

92. *See id.* at 13–16.

93. *Id.* at 27–32.

94. *People ex rel. Gallo v. Acuna*, 929 P.2d 596, 617 (Cal. 1997).

95. *Id.*

96. Lindsay Crawford, Comment, *No Way Out: An Analysis of Exit Processes for Gang Injunctions*, 97 CALIF. L. REV. 161, 178–79 (2009).

notwithstanding their lack of formal membership, and individuals who are not actually associated with the gang but who claim allegiance to the gang or engage in activities that promote or fortify the gang, even though the individuals are not recognized by the gang or its members as being so connected or even personally known to or acquainted with any actual gang members, associates, or affiliates. Under current practice, an individual may only be cited or prosecuted for violating the injunction if he has notice of the injunction.<sup>97</sup> So only individuals who have been physically served with it are obligated to abide by the injunction. So long as the gang injunction is in force, the police are free to serve additional gang members without any further judicial procedure.<sup>98</sup> Gang members do not have such flexibility. There is no standard procedure for being “removed” from the injunction once served.<sup>99</sup>

Law-on-the-books offers two consequential paths for each injunction violation. Misdemeanor public nuisance charges involve a criminal prosecution. Violators may also be issued citations charging them with civil or criminal contempt of court. Law-in-action presents a more varied consequential menu. In practice, gang injunctions result in relatively few arrests and even fewer direct or formal legal sanctions.<sup>100</sup> Instead, most law enforcement agencies charged with injunction enforcement have formal or informal orientations that expressly or implicitly view gang injunctions as reviving the discretion police enjoyed in the order-maintenance era. For example, the city of Long Beach, California, uses a “catch-and-release” policy focused on reducing the number of gang members on the street at any given moment.<sup>101</sup> Other jurisdictions report that police officers exercise their discretion in determining whether or not to cite, arrest, or ignore injunction violations because “they get more mileage from the gang

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97. *Id.* at 178.

98. *Id.*

99. Officially, gang members are able to petition the court for removal, and several cities have implemented extra-judicial procedures. See JOHN A. RUSSO & ANTHONY W. BATTS, JOINT INFORMATIONAL REPORT FROM THE CITY ATTORNEY'S OFFICE AND THE OAKLAND POLICE DEPARTMENT ON THE CITY'S CIVIL INJUNCTION CASES AGAINST THE NORTH SIDE OAKLAND GANG AND THE NORTEÑOS GANG 4 (2011), [http://www.oaklandcityattorney.org/PDFS/Report to Public Safety Targeted Injunctions 2.22.11.pdf](http://www.oaklandcityattorney.org/PDFS/Report%20to%20Public%20Safety%20Targeted%20Injunctions%202.22.11.pdf) (explaining Oakland's “out-out” process). These avenues have not meaningfully facilitated exit for gang members trying to find or having found a way out of gang life. For a detailed review and critique of exit procedures, see Crawford, *supra* note 96, at 180–93.

100. Gang Injunction Comm., *Management and Audit of Gang Injunctions*, in 2003-2004 LOS ANGELES COUNTY CIVIL GRAND JURY FINAL REPORT 169 (2004), [http://grandjury.co.la.ca.us/gjury03-04/LACGJFR\\_03-04.pdf](http://grandjury.co.la.ca.us/gjury03-04/LACGJFR_03-04.pdf).

101. O'DEANE, *supra* note 20, at 71.

injunctions by using them as a negotiating tool to gain information on the streets.”<sup>102</sup> There are also significant practical consequences unrelated to the enforcement of gang injunctions. For example, injunctions are revealed in employment background checks, which limits injunctees’ access to legitimate employment and both public and private housing.<sup>103</sup>

The creative logic behind the gang injunction as an approach to gang intervention is obvious. Moreover, they are responsive to each of the main factors that rendered conventional strategies impracticable in the 1980s. The gang injunction is touted as relatively cost effective. Its civil structure enables extremely low cost enforcement through civil or misdemeanor procedures,<sup>104</sup> the foundation of which is established only once in the initial abatement action.<sup>105</sup> The savings associated with these economies of scale and scope is reinforced by the heightened community surveillance gang injunctions permit, which proponents claim creates deterrent reverberations at no additional enforcement cost. Through that heightened surveillance, which is explicitly sanctioned for injunctees and implicitly supported for the wider safety zone population, law enforcement is able to bypass much of the constitutional criminal procedural strictures and redeploy the flexibility and discretion to strategically target delinquent youth for the types of behavior that was the object of historical order-maintenance policy. Gang injunctions are also responsive to the “tough on crime” political climate by communicating absolute intolerance for gangs and by narrowly circumscribing the liberty of perceived criminals.<sup>106</sup>

## II. THE GANG INJUNCTION DEBATE

As law enforcement crystallized the gang injunction model, use of the mechanisms increased at a slow pace.<sup>107</sup> Not surprisingly, it took a full decade before any gangs meaningfully responded to an injunction. That response came in the form of a well-mounted legal challenge to a model gang injunction entered against the Varrío Sureño Town gang in San Jose, California.<sup>108</sup> The individuals the city named as

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102. *Id.*

103. Crawford, *supra* note 96, at 179–80.

104. SHINER, *supra* note 89, at 51–52.

105. *Id.*

106. See Walston, *supra* note 19.

107. For example, five years passed between the Playboy injunction and the next attempt. See O’DEANE, *supra* note 20, at 318, 320.

108. The American Civil Liberties Union of Southern California intervened in the Playboy Gangster Crip injunction *sua sponte* but did not represent any named individual. Reportedly, the ACLU never even met with any of the defendants. Joan W.

representatives of the gang won small victories in skirmishes before the abatement action reached the California Supreme Court, where the initial victories were overshadowed by the resounding loss of the battle. The court concluded that well-tailored gang injunctions did not exceed the bounds of any constitutional protection.<sup>109</sup> In the aftermath of that decision, a tidal wave of injunction activity traveled across the state,<sup>110</sup> and the ripples of that wave were felt in emergent gang markets.

The sudden salience of gang injunctions ignited a flare of analysis and evaluative scrutiny. This discourse, generally, speaks from one of two perspectives that squarely frame gangs as presenting crime problems. Focusing predominantly on expression, discrimination, and criminal procedure, a constitutional/civil rights perspective asks whether, to what extent, and how and why gang injunctions do or do not comport with constitutional guarantees. The majority of academic and popular discussions engage this perspective, but a criminological view complements it, asking whether gang injunctions effectively reduce the chronic problems associated with gangs and encourage or discourage association with or disassociation from gangs. The weight of available legal, theoretical, and empirical evidence proffered by competing perspectives is inconclusive, so the academic conversation has languished, giving way to a primarily ideological debate in local politics as the strategies are introduced or expanded.

#### *A. The Civil Rights Perspective*

Civil rights critics of gang injunctions concede that gangs present criminological problems, but they claim that countervailing constitutional concerns constrain the government's ability to address those problems in ways that impinge on the civil liberties of gang members. At the highest level of generality, these arguments express concern that gang injunctions undermine constitutional limitations on police and government discretion that were established in the 1960s.<sup>111</sup> In so arguing, commentators have raised a diverse set of concerns, but

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Howarth, *Toward the Restorative Constitution: A Restorative Justice Critique of Anti-Gang Public Nuisance Injunctions*, 27 HASTINGS CONST. L.Q. 717, 730 (2000).

109. *People ex rel. Gallo v. Acuna*, 929 P.2d 596, 608–11 (Cal. 1997).

110. On average, a Southern California gang was enjoined every two months from 1996 to 1999. *See, e.g.*, MAXSON ET AL., COMMUNITY ASSESSMENT, *supra* note 70, at 3; Cheryl L. Maxson, Karen Hennigan & David C. Sloane, *For the Sake of the Neighborhood? Civil Gang Injunctions as a Gang Intervention Tool in Southern California*, in POLICING GANGS AND YOUTH VIOLENCE 239, 250 (Scott H. Decker ed., 2003).

111. For a general review of this perspective with respect to a broader category of order-maintenance policing, see Nicole Stelle Garnett, *Relocating Disorder*, 91 VA. L. REV. 1075 (2005).

three dominate: free expression and association, due process, and equal protection. The direct response to each of these critiques has been formalistic, but at a normative level, proponents of gang injunctions and analogs assert that gang injunctions protect and empower the same communities for whom the critics claim to provide a voice.

#### 1. THE FIRST AMENDMENT CHALLENGE

Specific restrictions of the model injunction have been challenged as improper infringements of First Amendment guarantees of freedom of expression and association. The tenor of such arguments is uncomplicated.<sup>112</sup> Gang injunction provisions implicate these constitutionally protected freedoms by preventing all communicative interaction with other gang members and prohibiting the display or use of words, phrases, and symbols connected to the gang. In so doing, gang injunctions indiscriminately apply to protected instrumental and intimate association in the same way they apply to unprotected illicit association.<sup>113</sup> They proscribe expression in ways that are not content neutral<sup>114</sup> and only tangentially related to compelling government interests.<sup>115</sup> Under the First Amendment challenge, such broad restrictions exceed the constitutionally safe bounds charted by the standards providing that government may regulate expression “only to prevent grave and immediate danger to interests which the state may lawfully protect,”<sup>116</sup> which regulation must be narrowly tailored to catch only such expression as is necessary to serve that significant governmental interest.

Notwithstanding their intuitive potential, such arguments fail to gain judicial traction. Freedom of speech and association are fundamental, but not absolute, rights. Even countenancing the claim that gang injunctions encroach on intimate and expressive association, as the Supreme Court has developed those concepts, the Court has carved association engaged in for illicit purposes out of the sphere of constitutional protection. Likewise, communicative acts that do not express some political, social, economic, educational, religious, or

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112. Terence R. Boga, Note, *Turf Wars: Street Gangs, Local Governments, and the Battle for Public Space*, 29 HARV. C.R.-C.L. L. REV. 477, 478, 494–501 (1993).

113. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617–20, 622 (1984).

114. Gang injunctions are contingent, unarguably, on the identity of the speaker.

115. Gang injunctions restrict gang members’ ability to, for example, discuss the weather or engage in group prayer at church. Such restrictions, unarguably, serve little direct governmental end.

116. *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943).

cultural viewpoint are not conferred First Amendment protection.<sup>117</sup> It is well established that speech having the illicit purpose of furthering a criminal enterprise falls into the unprotected category.<sup>118</sup>

## 2. THE DUE PROCESS CHALLENGE

Due process arguments present a broader attack on the mechanism itself, rather than on its specific provisions, challenging as inadequate the notice and procedural fairness of gang injunctions. This critique has been leveled several ways, but the principal claim is this: the Fourth Amendment procedures that are concomitant with criminal law sanctions provide heightened protections that the Fifth and Fourteenth Amendments' due process clauses make impossible to circumvent by using civil law to impose probation- and parole-like restrictions on individuals (i.e., the ambiguous notion of "gang member") suspected to be generally engaged in, or to have a propensity to commit, but not convicted of, any crime.<sup>119</sup> The argument contends that gang members have a right to adequate notice of criminalized conduct and an opportunity to defend against charges leveled against them in a manner that comports with the Fourth, Fifth, and Fourteenth Amendments.

The due process critique is factually accurate to the extent that the circumvention of the onerous prosecutorial burdens imposed by the rules of constitutional criminal procedure is among the fundamental attractions of gang injunctions for law enforcement.<sup>120</sup> Nonetheless, the challenge has failed to gain traction for the technically sound, if teleologically suspect, reason that the nuisance abatement actions to which the injunctions are the equitable remedy do not constitute criminal prosecutions. At most, they may lead to a criminal prosecution but only upon violation and if the city decides to prosecute the offense as a misdemeanor. In which cases, the state has an obligation to prove beyond a reasonable doubt (and the accused injunctee has the opportunity to defend against) each element of the misdemeanor. Less formalistically, the injunction process itself gives ample notice to potential injunctees of the clearly defined parameters of permissible and impermissible conduct.<sup>121</sup> Abatement actions also militate against any notice deficiency couched in a claim that the term "gang member" is

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117. Walston, *supra* note 19, at 63.

118. *Id.* at 64.

119. Stephanie Smith, *Civil Banishment of Gang Members: Circumventing Criminal Due Process Requirements?*, 67 U. CHI. L. REV. 1461, 1462, 1468, 1480, 1487 (2000); Strosnider, *supra* note 19, at 113, 122–23, 126, 130, 141, 143.

120. O'DEANE, *supra* note 20, at 322.

121. *See, e.g.*, SHINER, *supra* note 89, at 27, 45, 51 (outlining the legal process for obtaining and enforcing a gang injunction).

imprecisely defined<sup>122</sup> because, before any prosecution, an individual will be served with the injunction, which gives him the opportunity to petition the court for exclusion from the injunction on the grounds that he is not a gang member.

### 3. THE EQUAL PROTECTION CHALLENGE

Another category of constitutional objections to gang injunctions is based on the Equal Protection Clause's guarantee that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws."<sup>123</sup> The objection is presented in both race-neutral and race-based terms, but both versions stake the same claim: gang injunctions prohibit individuals from engaging in conduct in which others can engage freely based solely on the constrained individual's status.<sup>124</sup>

The race-neutral equal protection claims<sup>125</sup> challenge the gang injunction's branding of innocent conduct as nuisance solely because a gang member performs it. Traditionally, it is the activity that constitutes a nuisance, not the person who performs it.<sup>126</sup> However, under the gang injunction paradigm, the status of the actor determines an act's noxiousness. For example, nothing is intrinsically injurious about the color red. Wearing red is not a nuisance under any lay, common law, or civil law definition of the term. That is, unless you are a member of an enjoined Blood gang, whose thematic color is red. Given the expansive scope of the conduct enjoined in a boilerplate gang injunction, there is little to distinguish their effective prohibition of the

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122. This argument has been a central claim in several challenges to gang injunctions. See, e.g., Christopher S. Yoo, Comment, *The Constitutionality of Enjoining Criminal Street Gangs as Public Nuisances*, 89 NW. U. L. REV. 212, 221–22, 249 (1994).

123. U.S. CONST. amend. XIV, § 1.

124. Cathy Wang, *Gang Injunctions Under Heat from Equal Protection: Selective Enforcement as a Way to Defeat Discrimination*, 35 HASTINGS CONST. L.Q. 287 (2008).

125. Although nominally equal protection claims, this status-based argument would more properly be forwarded under the Eighth Amendment prohibition on cruel and unusual punishment. Its legal infirmities are substantially similar under that law.

126. Even scholarship that argues the difficulty of identifying nuisance doctrine's inherent limitations implicitly supports this point by discussing the *conduct* that interferes with other's enjoyment of their land. John Copeland Nagle, *Moral Nuisances*, 50 EMORY L.J. 265, 266–72 (2001). The one line of nuisance cases that could have been used to support the status nuisance principle underlying the gang injunction is the Jim Crow era race nuisance cases, which claimed that the presence of Black families in White neighborhoods would constitute nuisance. However, courts consistently rejected those claims. Rachel D. Godsil, *Race Nuisance: The Politics of Law in the Jim Crow Era*, 105 MICH. L. REV. 505, 535 (2006).

status of gang member from the types of status offenses that have been disfavored since the 1960s.<sup>127</sup>

The race-based version of the equal protection challenge rests on firmer constitutional footing, as the Fourteenth Amendment has been clearly interpreted to provide that states may not enact laws that expressly place arbitrarily enhanced burdens on the members of a protected class or to enforce laws in a manner that disproportionately burdens members of a protected class without a compelling interest pursued as narrowly as is reasonable. The core of this argument is that “[r]ace . . . is bound up in gang crime in a way that it is not necessarily implicated by other crimes . . . .”<sup>128</sup> This connection is not organic; rather, it reflects selective deployment of limited law enforcement resources toward minority communities.<sup>129</sup> As a result, “despite their lack of overt racial language, these [gang injunction] provisions—in particular, the restrictions on the rights to association and movement—bear an uncomfortable resemblance to the postbellum vagrancy laws,”<sup>130</sup> used to tightly control people of color and stamp their communities with badges of inferiority.<sup>131</sup> As enforced, injunctions are wielded against young men of color to either contain them in or banish them from designated communities.<sup>132</sup>

At least some empirical evidence supports these contentions. For example, no California gang injunction has been issued against a mainly White gang,<sup>133</sup> a fact that does not align with the statistically significant presence of *bona fide* White street gangs,<sup>134</sup> as well as the prevalence of White gang-like organizations that law enforcement fails to categorize

127. See, e.g., *Robinson v. California*, 370 U.S. 660, 666–67 (1962) (holding that a law which made “status” of narcotic addiction a criminal offense inflicted a “cruel and unusual punishment”). Beyond the scope of the present discussion are two important questions: (1) Whether gang member status is rightly considered volitional. (2) Whether it constitutes the type of alterable status (assuming it is meaningfully alterable) that an individual should be required to relinquish to enjoy benefits or be free from burdens. For a brief commentary critiquing the assumption of limited agency of the homeless, see Ellickson, *supra* note 57, at 1186–88.

128. Strosnider, *supra* note 19, at 125.

129. Cf. Brian W. Ludeke, *Malibu Locals Only: “Boys Will Be Boys,” or Dangerous Street Gang? Why the Criminal Justice System’s Failure to Properly Identify Suburban Gangs Hurts Efforts to Fight Gangs*, 43 CAL. W. L. REV. 309, 322–23 (2007).

130. Gary Stewart, *Black Codes and Broken Windows: The Legacy of Racial Hegemony in Anti-Gang Civil Injunctions*, 107 YALE L.J. 2249, 2250, 2268 (1998).

131. *Id.*

132. Smith, *supra* 119.

133. O’DEANE, *supra* note 20, at 155, 157–58.

134. For example, a 2006 survey indicates that fourteen percent of gang members are White. *Id.* at 155.

as gangs.<sup>135</sup> Informal studies and anecdotal evidence also support an inference that gang injunctions most often enter a locality's gang strategy in circumstances that suggest at least a partially racialized motivation. For example, in California, local authorities have filed abatement actions almost exclusively where the targeted gang territory abutted or encroached upon geographic spaces with significant White populations or that were in the process or on the threshold of a formal or informal urban renewal project,<sup>136</sup> which are almost invariably associated with gentrification.<sup>137</sup>

A complement to claims that gang injunctions are overtly discriminatory is the charge that they have a disparate impact on people of color. Because injunctions target the entire, undefined, membership of the named gang, all people (and especially adolescent and young adult males) belonging to the racialized group or groups associated with the enjoined gangs are subject to heightened police surveillance.<sup>138</sup> Such surveillance categorically burdens group members' engagement in innocent activity in a way that other affinity or identity groups' members are not burdened, even if members of those other groups live in the safety zone.<sup>139</sup> Civil rights activists claim that such injunctions do not merely invite, but demand, area police to engage in constitutionally suspect "racial profiling."<sup>140</sup> Even where police exercise their discretion

135. See generally Ludeke, *supra* note 129, at 319–20.

136. See YOUTH JUSTICE COALITION, CAMPAIGN RESEARCH: GANG INJUNCTIONS AND GANG DATA BASES 3–6 (2010); Frank P. Barajas, *An Invading Army: A Civil Gang Injunction in a Southern California Chicana/o Community*, 5 *LATINO STUD.* 393, 395–402 (2007).

137. For an interesting exploration of gentrification complementary to the previous description, see Keith Aoki, *Race, Space, and Place: The Relation Between Architectural Modernism, Post-Modernism, Urban Planning, and Gentrification*, 20 *FORDHAM URB. L.J.* 699 (1993); see also Jon C. Dubin, *From Junkyards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color*, 77 *MINN. L. REV.* 739, 770–74 (1993).

138. Stewart, *supra* note 130.

139. Cf. GLENN C. LOURY, *RACE, INCARCERATION, AND AMERICAN VALUES* 27–28 (2008) ("Our society—the society we have made—creates criminogenic conditions in our sprawling urban ghettos, and then acts out rituals of punishment against them as some awful form of human sacrifice."); Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 *STAN. L. REV.* 781, 790–92 (1994) (discussing how the disproportionate involvement of African Americans in the criminal justice system generally stigmatizes all minorities); Tracey L. Meares, *Social Organization and Drug Law Enforcement*, 35 *AM. CRIM. L. REV.* 191, 213 (1998); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 *STAN. L. REV.* 1271, 1304 (2004).

140. Bernard E. Harcourt, *Rethinking Racial Profiling: A Critique of the Economics, Civil Liberties, and Constitutional Literature, and of Criminal Profiling More Generally*, 71 *U. CHI. L. REV.* 1275, 1278 (2004).

judiciously, individuals will be subject to more scrutiny based solely on their imputed racial or ethnic identity.<sup>141</sup>

The constitutionally weak status-based version of the equal protection argument also bolsters claims of disparate impact and discriminatory intent.<sup>142</sup> As discussed above, gang injunctions do not universally single out individuals because of their gang membership. Rather, gang status discrimination includes a racialized component. Only gangs with certain racialized or ethnic identities are targeted. Gang injunctions disparately impose restrictions on *minority* gangs that are not imposed on majority gangs: Latino and Black gangs are enjoined; White gangs are not.<sup>143</sup>

Like other constitutional challenges to gang injunctions, equal protection claims command little traction. Their primary weakness is that these challenges are seen to conflate the constitutionally infirm causal linking of race and status—perpetuated, for example, by the types of vagrancy laws invalidated during the 1960s—with evidence-based (but not causal) correlations between race and gang membership.<sup>144</sup> Notwithstanding the greater potential burdens on certain groups of color, gangs are enjoined not because of their race (i.e., animus discrimination) but because of their proven record of causing criminal public nuisances (i.e., statistical discrimination).<sup>145</sup>

The successful defenses of gang injunctions against constitutional challenges are formalistically sound. However, they self-consciously fail to respond to the core concerns proponents of the challenges raise. For example, Tracey Meares and Dan Kahan offer the strongest academic support of these types of strategies,<sup>146</sup> and they concede that

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141. So, a Black man in an area where the gang colors are blue may refrain from wearing that color to avoid being deemed a gang member by police.

142. Interestingly, notwithstanding the Supreme Court's disapprobation of "selective enforcement" in *Whren v. United States*, 517 U.S. 806 (1996), such claims have not been the central focus of equal protection challenges to gang injunctions.

143. A review of gang injunctions issued in California from 1980 to 2010 revealed only three injunctions issued against gangs that were predominantly neither Black nor Latino. All three were Asian gangs. O'DEANE, *supra* note 20, at 155–58.

144. Expressed in explicit terms, the weakness of the conflation becomes clearer. The causal linking of race and gang status would read thusly: "Latinos tend to be gang members." The correlative relation would read: "Gang members tend to be Latino." The former displays racialized thinking that has been widely disavowed, but the latter states an empirically testable and possibly acceptable factual assertion. Beyond the scope of the present discussion, but a concern that undergirds it, is whether and how market exclusion that is caused or reinforced by law influences the subjective perceptions that lie hidden in the latter statement.

145. O'DEANE, *supra* note 20, at 157–58; Harcourt, *supra* note 140, at 1276.

146. See generally Meares & Kahan, *supra* note 19 (primarily discussing anti-gang ordinance, but drawing connections among other strategies, including gang injunctions).

injunction-type measures potentially impinge civil liberties.<sup>147</sup> However, they use anti-paternalism justifications to urge a reframing of some and jettisoning of other constitutional limitations that could constrain their use.<sup>148</sup> Under their “neo-political process theory of criminal procedure,”<sup>149</sup> anti-gang measures are not necessarily discriminatory.<sup>150</sup> Instead, they act as an instrument of political and social empowerment for traditionally insular minority communities that bear the brunt of the social costs of crime.<sup>151</sup>

### B. Criminological Perspectives

Criminological perspectives of gang injunctions even more directly center the debate on crime and criminal law by evaluating the empirical effect of gang injunctions on crime and their theoretical conformity with prevailing beliefs about gang delinquency and crime. Gang injunctions have received much attention anecdotally attesting to their efficacy on these terms. However, despite the theoretical novelty, rapid proliferation, and relative stability, once obtained, of gang injunctions, there is very little systematic statistical, phenomenological, or theoretical inquiry into the mechanism.<sup>152</sup>

#### 1. EMPIRICAL STUDIES

Three studies form the foundation of the empirical debate about gang injunctions. First, the American Civil Liberties Union of Southern California analyzed the impact on area crime of the highest profile and most extensive gang injunction sought to date, by the City of Los Angeles against Blythe Street, a well-known Latino gang.<sup>153</sup> The ACLU’s review of crime statistics gathered over the two-year period that straddled the time immediately pre- and post-injunction concluded that not only had the injunction failed to decrease violent crime and

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147. *Id.* at 210 (admitting that “the gang loitering law burdens the liberty of a minority—gang members and sometimes juveniles . . .”).

148. *Id.* at 201–08; *see also* Tracey L. Meares & Dan M. Kahan, *Black, White and Gray: A Reply to Alschuler and Schulhofer*, 1998 U. CHI. LEGAL F. 245, 254–56 (reiterating the same).

149. Erik G. Luna, *Sovereignty and Suspicion*, 48 DUKE L.J. 787, 809 (1999).

150. Meares & Kahan, *supra* note 19, at 209.

151. Meares & Kahan, *supra* note 148; Meares & Kahan, *supra* note 19; *see also* RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 17, 76–135 (1997) (using the “politics of respectability” to make a complementary claim about the importance of heightened law enforcement efforts in Black communities).

152. MAXSON ET AL., *COMMUNITY ASSESSMENT*, *supra* note 70.

153. ACLU FOUND. OF S. CAL., *supra* note 15.

drug trafficking within the safety zone, but the injunction contributed, at least indirectly, to the increase in such crime in adjacent areas because of “spillover” effects.<sup>154</sup>

Jeffery Grogger compared crime statistics for the years immediately preceding and following the entrance of gang injunctions entered over an eight-year period in fourteen jurisdictions to reject the ACLU’s claim that the mechanisms could have spillover effects into surrounding communities.<sup>155</sup> The study, which remains the most rigorous empirical analysis of gang injunctions to date, estimated that gang injunctions reduced crime in the safety zone by five to ten percent in the first year.<sup>156</sup>

Several years later, Grogger’s findings were essentially updated and reproduced in a Los Angeles Civil Grand Jury study.<sup>157</sup> The report concluded that gang injunctions targeting highly territorial gangs that engaged in “outdoor” behavior had short-term positive impacts on overall crime, which decreased three to seven percent in the one-year period immediately following implementation. However, they had no long-term impact, and first year crime reductions were not maintained in subsequent years.<sup>158</sup>

Such ambivalent quantitative results have been matched by the qualitative findings. Cheryl Maxson, working with various collaborators, has been the most prolific contributor to this train of the debate. Drawing on extensive existing criminological and social psychological literature, Maxson, Hennigan, and Sloane suggest three possible benefits of gang injunctions: deterrence,<sup>159</sup> “individualization,”<sup>160</sup> and community empowerment.<sup>161</sup> In a series of

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154. *Id.* at 44. A more limited study of an injunction in place in Inglewood, California that was conducted around the same time also found no support for the claim that gang injunctions decrease crime. CHERYL L. MAXSON & THERESA L. ALLEN, SOC. SCI. RESEARCH INST., AN EVALUATION OF THE CITY OF INGLEWOOD’S YOUTH FIREARMS VIOLENCE INITIATIVE 2 (1997).

155. Jeffrey Grogger, *The Effects of Civil Gang Injunctions on Reported Violent Crime: Evidence from Los Angeles County*, 45 J.L. & ECON. 69 (2002).

156. *Id.* at 89.

157. Gang Injunction Comm., *supra* note 100.

158. *Id.* at 214–15.

159. MAXSON ET AL., COMMUNITY ASSESSMENT, *supra* note 70, at v, 4.

160. This concept posits that gang injunctions can disrupt the groupthink and cohesiveness that permit gangs to perpetuate criminal behavior by stemming members’ cognitive conflation of their personal and gang identities. *Id.* at 4; *see also* Cheryl L. Maxson, *Civil Gang Injunctions: The Ambiguous Case of the National Migration of a Gang Enforcement Strategy*, in AMERICAN YOUTH GANGS AT THE MILLENNIUM 375 (Finn-Aage Esbensen, Larry Gaines & Steve Tibbetts eds., 2004).

161. This social cohesion hypothesis suggests that involving community members in the effort to reduce the presence of gangs in and influence of gangs on a neighborhood opens space and provides opportunities for endogenous creation of

subsequent studies, Maxson has tested this hypothesis, with mixed results. For example, while residents in high crime areas expressed fewer perceptions of fear, intimidation, and visibility in the short term, low crime area residents experienced increases in the same.<sup>162</sup> No study observed greater social cohesion or community empowerment.<sup>163</sup>

## 2. LEGAL STUDIES

Criminological legal perspectives are also ambivalent. For example, early in the germination of gang loitering ordinances, Meares and Kahan offered commentaries on the laws, which they see as substantively analogous to gang injunctions,<sup>164</sup> that provided support for such measures.<sup>165</sup> Relying heavily on her nuanced reanimation of the classic approach to juvenile criminality known as “social disorganization theory,”<sup>166</sup> Meares suggested that such measures promote ameliorative social organization by contributing to positive redistribution of legitimized social capital in gang-plagued communities, which enables the transmission and informal enforcement of mainstream norms by community members.<sup>167</sup> Kahan arrived at much the same upshot along the path of “social influence.”<sup>168</sup> Using that social psychology trope, which posits that individuals tend to conform their behavior to the expectations and behavior of others, Kahan suggested that suppression of gang activity using injunctions, curfews, and loitering laws, would reverse the perception that gang activity was rampant in or valued by the relevant community.<sup>169</sup> That

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informal social controls, development of social capital, and construction of supportive organizational structures. MAXSON ET AL., *COMMUNITY ASSESSMENT*, *supra* note 70, at 5.

162. Cheryl Maxson, Karen M. Hennigan & David C. Sloane, “*It’s Getting Crazy Out There*”: *Can a Civil Gang Injunction Change a Community?*, 4 *CRIMINOLOGY & PUB. POL’Y* 577, 596 (2005).

163. *Id.* at 596–97.

164. Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 *GEO. L.J.* 1153, 1166 (1998) (stating they are “nearly indistinguishable”).

165. *Id.* at 1167; *see also* Meares & Kahan, *supra* note 148, at 245.

166. *See generally* CLIFFORD R. SHAW & HENRY D. MCKAY, *JUVENILE DELINQUENCY AND URBAN AREAS* (rev. ed. 1969) (setting forth a “social disorganization theory,” which argues that ecological factors matter more in explaining delinquency than individual offender characteristics).

167. Meares, *supra* note 139, at 223–26.

168. Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 *VA. L. REV.* 349, 373–77 (1997) [hereinafter Kahan, *Social Influence*].

169. *Id.* at 374–77; *see also* Dan M. Kahan, *Between Economics and Sociology: The New Path of Deterrence*, 95 *MICH. L. REV.* 2477, 2488–89 (1997) [hereinafter Kahan, *New Path*].

change, in turn, would cyclically relieve any reputational pressure to join gangs and reinforce law-abiding behavior.<sup>170</sup> Both Meares and Kahan, however, recognized that their arguments lacked empirically conclusive support,<sup>171</sup> and neither engaged in an in-depth analysis of the gang injunction phenomenon itself.<sup>172</sup>

Although they do not engage each other, Maxson's empirical conclusions have strained Meares' and Kahan's hypotheses, and the work of several other scholars directly and indirectly challenges their optimism. The main indirect critiques of mechanisms like gang injunctions reject their implicit theoretical foundation,<sup>173</sup> which both Meares and Kahan, at least partially, endorse: the "broken windows" theory, famously proposed by James Q. Wilson and George L. Kelling.<sup>174</sup> Broken windows critiques are strengthened by Bernard Harcourt's work systematically refuting the strongest empirical validation of the theory.<sup>175</sup> Dorothy Roberts outlines higher order reservations.<sup>176</sup> She understands anti-gang ordinances as experimental policing carried out to test the manipulation of social norms affected by broken windows policing in the name of majoritarian welfare at the expense of minority freedom, which is linked to the social meaning within those communities of aggressive policing.<sup>177</sup>

Beth Caldwell and Joan Howarth directly consider gang injunctions. Caldwell's interview-based study tested the application of

170. Kahan, *New Path*, *supra* note 169.

171. *See, e.g.*, Kahan, *Social Influence*, *supra* note 168, at 377.

172. Other criminological legal perspectives also provide indirect theoretical support for gang injunctions. *See, e.g.*, Ellickson, *supra* note 57, 1168–69; Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 557–61 (1997); Mark D. Rosen, *Our Nonuniform Constitution: Geographical Variations of Constitutional Requirements in the Aid of Community*, 77 TEX. L. REV. 1129, 1176 (1999).

173. *See, e.g.*, Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457 (2000); K. Babe Howell, *Broken Lives from Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. L. & SOC. CHANGE 271, 322–23 (2009); Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457 (2000).

174. James Q. Wilson & George L. Kelling, *Broken Windows*, ATLANTIC, Mar. 1982, at 28, 29–38 (arguing that physical and social disorder sends a signal to more serious criminals that no one cares about a block or neighborhood).

175. Bernard Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Social Experiment*, 73 U. CHI. L. REV. 271, 272 (2006); Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291, 293 (1998).

176. Roberts, *supra* note 61, at 833–34.

177. *Id.*

“multiple-marginality theory,” which claims gangs are the progeny of social marginalization,<sup>178</sup> instead of the dominant ecological view Meares advances. She concludes that injunctions reinforce gang membership by exacerbating key marginality indicators across different scales.<sup>179</sup> Among the aggravators she identified in interviews with both gang members and community members are negative labeling of injunctees, increased police contact (especially incarceration of non-affiliated youth and peripheral gang members), and cuckolding of natural aging and “jobbing” out processes.<sup>180</sup> Howarth’s restorative justice appraisal is similarly critical of the ways gang injunctions undermine their purported purposes.<sup>181</sup> The theory of restorative justice identifies the ameliorative potential of locally driven alternatives to criminal law as their ability to promote community integration.<sup>182</sup> Gang injunctions consistently flounder in that respect. For example, injunctions ascribe to “a notion of community safety and individual liberties as directly in conflict, as warring combatants in a winner-take-all contest”<sup>183</sup> in which the categories of gang members and community members are completely separated and in opposition, which solidifies gang exclusion from the community.<sup>184</sup> In the accounts of both Caldwell and Howarth, gang injunctions serve to excise actual and suspected gang members from the community in ways that further destabilize mainstream norm building,<sup>185</sup> while the heightened surveillance of community outcasts perpetuates rather than undermines social influence factors that contribute to gang emergence.<sup>186</sup>

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178. Beth Caldwell, *Criminalizing Day-to-Day Life: A Socio-Legal Critique of Gang Injunctions*, 37 AM. J. CRIM. L. 241, 260–62 (2010) (citing JAMES DIEGO VIGIL, *BARRIO GANGS: STREET LIFE AND IDENTITY IN SOUTHERN CALIFORNIA* (1988)).

179. *Id.* at 262–70.

180. *Id.*

181. Howarth, *supra* note 108, at 736.

182. John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME & JUST. 1, 5 (1999); Nils Christie, *Conflicts as Property*, 17 BRIT. J. CRIMINOLOGY 1, 5 (1977).

183. Howarth, *supra* note 108, at 735.

184. *Id.* Similarly anti-restorative justice outcomes result from the other provisions. Instead of individual accountability, gang injunctions create more injury and impute responsibility to a deindividuated group, the majority of whose members have not caused any harm, and a small number of whom are being held accountable for the most insignificant of their norm infraction.

185. In the general criminal context, Meares has problematized the tendency of incarceration to produce the same results. *See, e.g.*, Meares, *supra* note 139. She and Kahan distinguish between “draconian” enhancements and mandatory minimums that result in long-term incarceration with the “relatively mild” consequences of gang ordinances and the like. Meares & Kahan, *supra* note 19, at 210.

186. Boga, *supra* note 112, at 502.

Constitutional and criminological approaches to gang injunctions that cast the underlying issues in terms of criminality have reached a functional evaluative impasse, which impedes productive scholarly and political discourse. Although existing commentary has failed to recognize it, property law constitutes a third logical perspective from which to consider this gang response tool. This new angle offers a useful way of thinking about gang injunctions and the problems they address, which has the potential to break the decades-long impasse produced by the stale existing debate.

### III. A PROPERTY PERSPECTIVE FOR THE GANG INJUNCTION DEBATE

A property perspective is ever-present in the interstices of, but absent from the direct, conscious existing gang injunction dialogue and debate. It reveals that a key set of problems posed by gangs, generally, and the core of the problems targeted by gang injunctions, specifically, present considerations traditionally examined under the rubric of property law. Two connected bases form the foundation of this argument. First, in electing to manage gang criminality by controlling the movement and actions of gang members, local governments implicitly and expressly frame the problem as fundamentally concerned with property. That framing is, in turn, consistent with the relationship between street order and property law, which reveals a close connection between the gang injunctions and land use management principles. Second, existing discourse centers on gangs as wholly criminal institutions engaged in terminally violent conduct to advance financial objectives. However, violence, criminality, and entrepreneurialism are generally secondary or tertiary projects of the types of gangs subject to gang injunctions.<sup>187</sup> After reorienting gang behavior around its central function as a source of productive capital through identity, it becomes clear that gangs operate as mechanisms for the creation, development, and acquisition of the forms of property that have been recognized as central to human identity, development, and freedom.

#### *A. The Property Rhetoric and Modalities of Gang Injunctions*

Both the overt political rhetoric and the violent, destructive reality supporting gang injunctions justify the focus of gang injunction discourse on criminal and constitutional perspectives. However, even a cursory examination of the practical language and modalities of gang injunctions reveals that property considerations inhabit their center.

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187. See GEORGE W. KNOX, AN INTRODUCTION TO GANGS (6th ed. 2006) (1991) (citing sources exploring gang typologies).

This implicit property perspective frames gang activity as a criminal infringement of the property interests of host community members.

Proponents frame the gang problems directly addressed by gang injunctions as protecting the property interests of community members against criminal usurpation by gangs. The consistent theme underlying such justifications of gang injunctions is blight. Gangs visually assail the community aesthetic.<sup>188</sup> The California Supreme Court described such gang blight as the “display [of] casual contempt for notions of law, order, and decency”<sup>189</sup> primarily because gang members engage in everyday conduct in an “offensive and disruptive manner.”<sup>190</sup>

The aesthetic deformation, decay, and dilapidation that constitute blight are inextricably related to the ways real property is understood and valued.<sup>191</sup> This connection is salient in the modern context in which property ownership is a “placeholder” for a broader and different set of resources and normative aspirations that results in property owners becoming “much less interested in the on-site attributes of real estate than in the people, things, services, and conditions lying beyond . . . the property’s boundaries.”<sup>192</sup>

Similarly, the conduct uniquely targeted by gang injunctions (i.e., gang injunction provisions prohibiting otherwise lawful conduct) constrains behaviors that proponents claim impinges on the property interests of community members. The relevance to property interests of restrictions on carrying instruments capable of defacing property is clear, but the property theme is more generally prevalent. For example, the only direct harm caused by conduct like trespass, playing loud music, and graffiti is its attack on private property interests.<sup>193</sup> Loitering and obstructing thruways are associated with public property. The primary harm of the expressive and associational activity restricted by gang injunctions is that such activity facilitates or protects gang members’ ability to use public, private, and common property as they

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188. The exposition of the discursive and legal importance of property law’s role in enforcing dominant group defined aesthetics is beyond the scope of the present discussion.

189. *People ex rel. Gallo v. Acuna*, 929 P.2d 596, 601 (Cal. 1997).

190. *People ex rel. Totten v. Colonia Chiques*, 67 Cal. Rptr. 3d 70, 74 (Cal. Ct. App. 2007) (upholding the gang injunction issued against the Colonia Chiques gang).

191. Lee Anne Fennell has explored this concept from several perspectives in her discussion of the ways property “has come unbound from the four corners of the owned parcel.” LEE ANNE FENNEL, *THE UNBOUNDED HOME: PROPERTY VALUES BEYOND PROPERTY LINES 2* (2009).

192. *Id.*

193. For a detailed treatment of the harm of trespass, see, for example, Thomas W. Merrill, *Trespass, Nuisance, and the Costs of Determining Property Rights*, 14 J. LEGAL STUD. 13 (1985).

choose, which uses are deemed aesthetically objectionable. For example, wearing gang apparel<sup>194</sup> causes no direct harm, but it purportedly guarantees that gang members will not be disturbed while engaging in property-related activity like loitering or blocking the streets.

Independent of underlying rhetorical and practical applications, gang injunctions function as a very specific tool of crime control and prevention through land use management, a central function of any formal legal property regime.<sup>195</sup> In his well-known article on street order,<sup>196</sup> Robert Ellickson justified his attention on certain “problems”<sup>197</sup> presented by homelessness, like panhandling and skid rows, with the intuitive but underexplored assertion that “a specialist in property law approaches the issue of street order as a problem not of speech or of crime, but of land management.”<sup>198</sup> Nicole Steele Garnett has developed and engaged the connection between land use planning and street order. Through several pieces, she has created the most coherent framework for reinterpreting order-maintenance policy as land use policy.<sup>199</sup>

The ultimate goal of order-maintenance policing is to curb “disorder” in public spaces. The broken windows theory—which provides theoretical support for contemporary order-maintenance policies—posits that this visual assault creates and communicates the presence of criminogenic ecological characteristics and exhorts aggressive policing of the causes of those characteristics.<sup>200</sup> If the visual assault is a littered street, bans on littering should be vigorously enforced. If, instead, the “eyesore” is the public appearance of gang members, the implication is that communities must find or create rules

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194. This restriction is itself a restriction on traditional forms of property, as are many other typical provisions.

195. This property function is also a central task of municipal government, which opens space for local development of criminal law through these mechanisms.

196. Ellickson, *supra* note 57.

197. Ellickson can be and has been criticized for failing to support his normative conclusion that panhandling and skid rows themselves properly constitute problems with which local government should be concerned. *See, e.g.*, Stephen R. Munzer, *Ellickson on “Chronic Misconduct” in Urban Spaces: Of Panhandlers, Bench Squatters, and Day Laborers*, 32 HARV. C.R.-C.L. L. REV. 1, 33 (1997).

198. Ellickson, *supra* note 57, at 1171.

199. *See* Garnett, *supra* note 59; Garnett, *supra* note 111; Nicole Stelle Garnett, *Save the Cities, Stop the Suburbs?*, 116 YALE L.J. 598 (2006); Nicole Stelle Garnett, *Governing? Gentrifying? Seceding? Real-Time Answers to Questions About Business Improvement Districts*, 3 DREXEL L. REV. 35 (2010); Nicole Stelle Garnett, *The Order-Maintenance Agenda as Land Use Policy*, 24 NOTRE DAME J.L. ETHICS & PUB. POL’Y 131 (2010).

200. Wilson & Kelling, *supra* note 174.

or norms that prohibit the cause of such blight and, then, enforce them vigorously.

In this context, gang injunctions may be properly seen as a property law corollary to broken windows policing. The most overt tools of an order-maintenance policy orientation pursue this aim through strategies that directly or indirectly regulate property uses. An anti-loitering ordinance, for example, indirectly dictates acceptable uses for covered public spaces. Conversely, property regulation through land use policy itself can manifest order-maintenance ideals. Ellickson proposed applying principles of zoning, generally used with respect to private property, to public spaces.<sup>201</sup> Neal Kumar Katyal set forth a comprehensive set of architectural considerations that can promote or support policing aims.<sup>202</sup> Garnett has highlighted existing policies that function in this manner. For example, housing and building codes (and nuisance laws) target the physical and social disorder thought to contribute to urban decline. Formal zoning ordinances and informal zoning policy decisions (e.g., permitting skid rows and red light in certain districts, selective under- and over-enforcement of formal law) organize geographical spaces to separate “incompatible” uses.<sup>203</sup> Siting decisions can be used to concentrate “disorder” and decay in specific areas.<sup>204</sup> Selective building code enforcement and public-space zoning disperse unwanted behaviors.<sup>205</sup> Through a combination of these policies,

cities effectively have zoned certain individuals into a particular area for having characteristics that do not comport with society’s norms, ranging from economic status to professional occupation to race and ethnicity. Conversely, these cities also may have been zoning these individuals out of other areas of the city.<sup>206</sup>

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201. Ellickson, *supra* note 57, at 1220–23 (proposing the creation of red, yellow, and green zones to differentiate among the amount and type of disorder that is acceptable in a defined geographic space).

202. Neal Kumar Katyal, *Architecture as Crime Control*, 111 YALE L.J. 1039, 1091–127 (2002).

203. Asmara Tekle-Johnson, *In the Zone: Sex Offenders and the Ten-Percent Solutions*, 94 IOWA L. REV. 607, 641 (2009).

204. Vicki Been, *Conceptions of Fairness in Facility Siting*, 5 MD. J. CONTEMP. LEGAL ISSUES 13 (1994); Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?*, 103 YALE L.J. 1383 (1994).

205. Garnett, *supra* note 111.

206. Tekle-Johnson, *supra* note 203.

Through this lens, gang injunctions fit squarely, though contrariwise, within the land use management analytical category.<sup>207</sup> Garnett describes “neighborhood-exclusion zone” policies (e.g., excluding nonresidents from public housing or excluding drug arrestees/convicts from entire neighborhoods) that use zoning and trespass principles to affect the same sort of first generation change at which gang injunctions aim.<sup>208</sup> While the latter land use policies manifest order-maintenance ideals, gang injunction order-maintenance policies manifest land use planning principles.<sup>209</sup>

That many gang injunction provisions are not directly related to land does not detract from the point. From the city’s perspective, the personal property and liberty restrictions that dominate gang injunctions are instrumental substitutes for and complements to the real property decisions codified therein. Moreover, as developed in the section of this article that follows, the link between real property and personal “identity property”<sup>210</sup> in the gang context transforms personal property into a realty proxy for gang members marginalized from access to such property in their communities.

### *B. Gang Identity, Capital, and Property Theory*

Though underappreciated and under-theorized, the links among gang injunctions, order-maintenance policing, and land use management are straightforward. These links are consistent with the criminal conception of gangs. The socio-cultural, political, and economic functions of gangs as social actors and societal institutions, however, reveal that the central function of a gang is the promotion and creation of capital. Synthesized, the insights of several strands of property theory understand the capital with which gangs are preoccupied as falling within a distinct and particularly important category of property, referred to here as “identity property,”<sup>211</sup> that merits heightened protection or deference because it is closely connected to proper self-development. This conception of gangs and

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207. Gang injunctions also resemble sex offender residency programs, which have been explicitly and implicitly recognized as land use management policies. *See, e.g.,* Tekle-Johnson, *supra* note 203.

208. Garnett, *supra* note 111, at 1092.

209. To use Ellickson’s proposed model, the definition of the target or safety zone defines the boundaries of an implicit red zone (i.e., an area with high levels of chronic disorder) that the city is using the gang injunction to turn yellow (i.e., occasional but not chronic disorder is permissible). Ellickson, *supra* note 57, at 1220–22.

210. *See infra* note 326.

211. *See infra* note 326.

property provides a wholly property-centered account of gang injunctions.

#### 1. GANG RELATED: WHAT GANGS DO

The one-dimensional popular image of the contemporary gang member is that of predatory, drug terrorist.<sup>212</sup> However, nearly a century of sustained research tracing the evolution of American gangs paints a much more complex and nuanced picture.<sup>213</sup> Renderings of that picture vary considerably based on the methodological, theoretical, and normative orientation of the source. Within the dominant paradigm, for example, gangs may be cast as the core of a “minority urban underclass”<sup>214</sup> or as corporatized, profit-driven institutions of traditional masculinist economics.<sup>215</sup> Under a late modernist paradigm, gangs have been described as social actors representing a global culture of “armed young men.”<sup>216</sup> Notwithstanding these differences, near consensus has been reached that gangs tend to fill gaps that arise due to the unavailability or inaccessibility of mainstream and legitimized forms of capital.<sup>217</sup>

As early as 1916, scholars began to intuit that traditional notions of capital<sup>218</sup> were too narrow to capture the ways in which power (i.e., resources) is accumulated and exploited in social life.<sup>219</sup> Pierre Bourdieu responded to that intuition by redefining capital as the sum of

212. Hagedorn, *Gang Violence*, *supra* note 44, at 366.

213. For a review of this literature, see KNOX, *supra* note 187.

214. See, e.g., Joan W. Moore, *Isolation and Stigmatization in the Development of an Underclass: The Case of Chicano Gangs in East Los Angeles*, 33 SOC. PROBS. 1, 1–10 (1985); Sudhir Alladi Venkatesh & Steven D. Levitt, “*Are We a Family or a Business?*” *History and Disjuncture in the Urban American Street Gang*, 29 THEORY & SOC’Y 427, 432 (2000); Sudhir Alladi Venkatesh, *The Social Outcomes of Street Gang Involvement* 3–5 (Joint Ctr. for Poverty Research, Working Paper No. 250, 2001).

215. See, e.g., CARL S. TAYLOR, DANGEROUS SOCIETY 7–10, 61 (1990); Venkatesh & Levitt, *supra* note 214, at 447.

216. HAGEDORN, *supra* note 24, at 23–24 (“[T]he lines of distinction between different kinds of groups of armed young men are just not so clear anymore.”); Hagedorn, *Gang Violence*, *supra* note 44, at 366, 368.

217. Hagedorn, *Gang Violence*, *supra* note 44, at 390–91, 398–99, 401–03 (discussing the social, economic, and symbolic functions of gangs).

218. One traditional definition of capital is those “assets that yield income and other useful outputs over long periods of time.” Gary S. Becker, *Human Capital*, in THE CONCISE ENCYCLOPEDIA OF ECONOMICS 248, 248 (David R. Henderson ed., 2d ed. 2008).

219. See L. J. Hanifan, *The Rural School Community Center*, 67 ANNALS AM. ACAD. POL. & SOC. SCI. 130, 130–31 (1916) (describing social capital as the “tangible substances [that] count for most in the daily lives of a people”).

all the resources available to facilitate action,<sup>220</sup> which he elaborated into a quadripartite taxonomy: economic, cultural, social, and symbolic.<sup>221</sup>

Broadly, economic capital is equated with material wealth.<sup>222</sup> Cultural capital is comprised of “knowledge, skills and other cultural acquisitions, as exemplified by educational or technical qualifications.”<sup>223</sup> Social capital describes those resources available to secure benefits or advance one’s interests due to social connections, membership in social groups, or access to social networks.<sup>224</sup> And symbolic capital denotes the resources associated with one’s value as perceived by others—“accumulated prestige, celebrity, consecration or honour.”<sup>225</sup> The particular volume and composition of capital for an actor motivates that actor’s actions towards particular types of goals and interests and facilitates “social mobility.”<sup>226</sup> Conversely, lack of access to capital (or certain forms thereof) constrains the constellation of pursuits and interests available to the individual or group experiencing the capital deficit.<sup>227</sup>

Understanding Bourdieu’s capital taxonomy facilitates the disaggregation of the interconnected licit and illicit roles a gang plays not only in affected communities but also for its individual members.<sup>228</sup>

220. Pierre Bourdieu, *The Forms of Capital*, in HANDBOOK OF THEORY AND RESEARCH FOR THE SOCIOLOGY OF EDUCATION 241, 241–42 (John G. Richardson ed., 1986). For a brief intellectual history of the “plethora of capitals,” see Michael Woolcock, *Social Capital and Economic Development: Toward a Theoretical Synthesis and Policy Framework*, 27 THEORY & SOC’Y 151, 155 & 192 n.19, 159–61 (1998) (quoting James N. Baron & Michael T. Hannan, *The Impact of Economics on Contemporary Sociology*, 32 J. ECON. LITERATURE 1111, 1122 (1994)).

221. Bourdieu, *supra* note 220, at 243, 255 n.3.

222. John B. Thompson, *Editor’s Introduction* to PIERRE BOURDIEU, LANGUAGE AND SYMBOLIC POWER 14 (John B. Thompson ed., Gino Raymond & Matthew Adamson trans., Harvard Univ. Press 1991).

223. *Id.* Cultural capital is further differentiated into subtypes: embodied, objectified (e.g., physical cultural goods, like books), and institutionalized (e.g., institutional recognition of such capital, like diplomas). For Bourdieu, the neo-classical economic concept of human capital, most associated with Theodore Schultz and Gary Becker, would fall within this category. *See, e.g.*, GARY S. BECKER, HUMAN CAPITAL (1964); THEODORE W. SCHULTZ, INVESTING IN PEOPLE (1981).

224. Bourdieu, *supra* note 220, at 248–49 (“the aggregate of the actual or potential resources which are linked to possession of a durable network of more or less institutionalized relationships of mutual acquaintance and recognition”).

225. Randal Johnson, *Editor’s Introduction* to PIERRE BOURDIEU, THE FIELD OF CULTURAL PRODUCTION 7 (Randal Johnson ed., 1993).

226. Writing from a neo-Marxist perspective, Bourdieu saw the motivational power of capital as distinctly in line with traditional capitalist values.

227. Bourdieu, *supra* note 220, at 242, 247.

228. Kay Kei-Ho Pih et al., *Different Strokes for Different Gangs? An Analysis of Capital Among Latino and Asian Gang Members*, 51 SOC. PERSP. 473, 483–91

Criminological, legal, and political literature focuses on the illicit facets, evidenced by the substantial body of research documenting that contemporary gangs have evolved into vehicles of economic capital growth by creating long-term opportunities for financial mobility in response to alienation from and relegation in legitimate labor markets.<sup>229</sup> However, historically, the economic function of the gang has been secondary and tertiary to its social role.<sup>230</sup>

Extensive evidence illustrates the ways gangs are the source of significant alternate cultural, social, and symbolic capital. Theories of gang development and membership abound. For example, anomie or strain theory posits that gangs form a delinquent subculture in response to “status frustration” (i.e., opportunities to “succeed” as defined by mainstream society are unavailable).<sup>231</sup> Social disorganization posits that gangs form when social institutions responsible for transmitting societal norms are weak.<sup>232</sup> “Multiple marginality” theory considers gangs the outcome of marginalization at multiple levels, integrating the cultural insights of anomie theory and the ecological insights of social disorganization theory with key socioeconomic, historical, macrostructural, and social psychological theories of gang formation.<sup>233</sup> Complementing these institutional explanations, individual antecedents of gang membership are generally thought to include environmental and personal vulnerabilities (like living in socially disorganized areas), weak family structures, low or failing educational expectations or achievement, and association with deviant peers or family.<sup>234</sup> Although

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(2008) (citing Bourdieu, *supra* note 220, at 241–58; PIERRE BOURDIEU, *OUTLINE OF A THEORY OF PRACTICE* (Richard Nice trans., Cambridge Univ. Press 1977) (1972)). The Bourdieuan construct is not directly addressed in most relevant literature, but the substantive insight is consistent with his capital taxonomy.

229. See, e.g., Levitt & Venkatesh, *supra* note 23, at 755. Among the chief avenues of gang activity in pursuit of financial gain is participation in the illicit drug market and other profit-driven crime. Moderate success achieved with respect to economic capital, in turn, permits gang involvement to serve as a substitute for acquisition of legitimized human capital through education and training. See, e.g., Pih et al., *supra* note 228, at 484–85.

230. Brenda C. Coughlin & Sudhir Alladi Venkatesh, *The Urban Street Gang After 1970*, 29 ANN. REV. SOC. 41, 44 (2003) (citing articles creating a general “consensus” that identity construction is the primary function of gangs).

231. See, e.g., SCOTT H. DECKER & BARRIK VAN WINKLE, *LIFE IN THE GANG: FAMILY, FRIENDS, AND VIOLENCE* 7 (1996).

232. See, e.g., Irving A. Spergel & G. David Curry, *The National Youth Gang Survey: A Research and Development Process*, in *THE GANG INTERVENTION HANDBOOK* *supra* note 67, at 359, 384, 391.

233. See, e.g., JAMES DIEGO VIGIL, *A RAINBOW OF GANGS: STREET CULTURES IN THE MEGA-CITY* (2002).

234. TERENCE P. THORNBERRY ET AL., *The Antecedents of Gang Membership*, in *GANGS AND DELINQUENCY IN DEVELOPMENTAL PERSPECTIVE* 56 (2003).

not normally expressed in such terms, the common insight of these varying viewpoints is their diagnosis of the disjunction between mainstream sources of capital and the alternatives produced by gangs.<sup>235</sup>

“Linguistic capital,” a subset of cultural capital, provides an apt example of this disjunction. Substantial literature documents the standard language pattern deficits among underclass youth, who are excluded from certain social networks (partially) because of their inability to speak standard English to trade on linguistic capital valued in those networks.<sup>236</sup> The resulting social capital deficits reinforce labor market and educational obstacles that lead to further depressed volumes of economic and cultural capital, creating cyclical obstacles to acquiring social capital.<sup>237</sup> Such deficits tend to reflect environmental, familial, and educational factors that correlate with the individual and collective causes of gangs. In tandem, gang literature consistently indicates the importance of the development of gang argot,<sup>238</sup> which has little positive value within mainstream social networks but provides entry-level access to avenues for the acquisition of “gang capital,” that is capital of all forms that has purchase within the normative space gangs create.

Although gang capital creation and transmission has links to and is supported by the economic capital developed through primarily illicit channels, much of it is undertaken through either expressly legal or unregulated means. This more central focus of gangs is pursued primarily through the provision of surrogate sources of identity solidarity. Such identity becomes a valuable resource because the gang fills gaps left by other socio-cultural institutions.<sup>239</sup> That gap filling results in the formation of a shared normative community (distinct from the mainstream normative community in which gang members are situated) in which alternative gang capital has purchase and cachet: “Gangs represent the spontaneous effort of boys to create a society for themselves where none adequate to their needs exists.”<sup>240</sup>

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235. James Diego Vigil, *Group Processes and Street Identity: Adolescent Chicano Gang Members*, 16 *ETHOS* 421, 425–26, 442 (1988).

236. See generally BOURDIEU, *supra* note 222.

237. Prudence L. Carter, “Black” Cultural Capital, Status Positioning, and Schooling Conflicts for Low-Income African American Youth, 50 *SOC. PROBS.* 136, 137 (2003).

238. See, e.g., RUSSELL D. FLORES, *GANG SLANGING: A COLLECTION OF WORDS AND PHRASES USED BY GANG MEMBERS* (2d ed. 1998); see also Nat’l Gang Crime Research Ctr., *The Gang Dictionary: A Guide to Gang Slang, Gang Vocabulary, and Gang Socio-Linguistic Phrases*, 4 *J. GANG RES.*, Summer 1997, at 66.

239. See generally *THE MODERN GANG READER* § 2 (Arlen Egley Jr. et al. eds., 3d ed. 2006).

240. THRASHER, *supra* note 43, at 37. This statement could be interpreted as a vacuous, logical tautology. All categories of activity and organization (regardless of

Cataloguing the full range of activities in which gangs engage in pursuit of identity formulation and capital creation is beyond the scope of the present discussion. However, two of the most important gang activities are particularly relevant to the exposition of the ideas being explored here: gang signs and gang territory.

The most important feature of gang identity is its symbology—the colors, signs, and symbols associated with the particular gang.<sup>241</sup> Gang members use this symbology in a variety of ways. The display of gang symbols through hand signs and unique identifying graffiti communicates a gang's presence in and claim of dominance over a geographic space.<sup>242</sup> The borders of a gang's geographic territory are clearly fenced in by graffiti, putting the entire community on notice of the gang's claim.<sup>243</sup> In so communicating, gang members occupy space in the community's consciousness, which accords them respect and status within their territory. Gang members also use gang symbols by wearing distinctive clothing and colors, physically marking their body with gang tattoos, incorporating gang symbols into their personal belongings, and adopting gang vernacular. By shrouding themselves in the adornments of the gang, members are able to expand their spatial dominance, if only temporarily, to unoccupied or neutral territories. In this way, they are able to carry a piece of their territory along with them.

There is a symbiotic relationship between gang signs and symbols and territory. Gangs create physical and psychological areas in which their identity has normative force and the capital associated with that identity has positive value. Gang territoriality itself is also a key aspect of gang identity.<sup>244</sup> The majority of gang activity is primarily or tangentially related to this territoriality. Reinforcing its symbolic territorial marking, gangs physically inhabit parks and other public spaces and thruways, as well as abandoned real property, in their

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their social acceptability or legality) arise to meet needs or wants not otherwise being met. Highlighting this fact, however, is the precise aim of the preceding statement and the elaboration that follows. Notwithstanding pathologies associated with gang formation, membership, and persistence, gangs are not pathological anomalies. They serve traditional and socially acceptable capitalist values of identity property production, reproduction, and exchange.

241. KNOX, *supra* note 187, at 35–36; *see also* ARNOLD P. GOLDSTEIN & D. W. KODLUBOY, *GANGS IN SCHOOLS: SIGNS, SYMBOLS AND SOLUTIONS* 33–34 (1998).

242. GOLDSTEIN & KODLUBOY, *supra* note 241, at 34–41.

243. *Cf.* David Ley & Roman Cybrinsky, *Urban Graffiti as Territorial Markers*, 64 *ANNALS ASS'N AM. GEOGRAPHERS* 491, 494–501 (1974).

244. This is evidenced, for example, by the sheer number of gangs whose names are related to the geographic territory they claim. Olivier Bangerter, *Territorial Gangs and Their Consequences for Humanitarian Players*, 92 *INT'L. REV. RED CROSS* 387 (2010).

claimed geographic space. When necessary, these claims are enforced (or charted) through force, resulting in storied gang wars.<sup>245</sup> Once dominion is established, however, gang members reportedly perform traditional functions of corporate owners. Within their territories gangs are free to control markets, especially illicit trade; assume a protective public function for community members; and temporarily or permanently transfer all or part of their claims by, for example, allowing an unaffiliated drug dealer to operate on a corner within the gang's territory. George Knox cites gangs that have implemented litter clean-up regimes, organized community social events, and doled out largess to incapacitated members.<sup>246</sup> Knox also reports that host community members themselves may solicit the gang's exercise of such ownership functions.<sup>247</sup> Through these activities gangs engage in relatively traditional strategies of brand development and diffusion, including the creation of goodwill and brand loyalty, creating benefits within the gang and within its territory.

Understandably, the correspondence between gang ownership and corporate ownership is imprecise. Since the gang's shadow territorial space overlaps with formal geographic spaces and is constrained by physically permeable barriers, the display of recognized gang symbols and the wearing of gang regalia function as a voucher or pass entitling the bearer to the privileges of possessory gang membership. In contrast, wearing rival gang gear or throwing rival gang hand signs alerts the resident gang of one's invasion of their territory, and wearing neutral clothing, arguably, communicates one's acquiescence to the possessory gang's stake. This image aligns with the capital deficit formulation advanced here.

Whether the positive contributions reoriented above as the core of gang activity outweigh the socially unattractive byproducts of gangs that occupy gang discourse, ultimately, involves complex empirical and qualitative questions resistant to measurement and analysis. But isolated from incendiary accounts of predatory criminality and violence, gang activity evinces less malevolent, and debatably benevolent, menace. Though standard avenues of capital acquisition are obstructed, unavailable, or inaccessible, gang members behave in many ways that indicate their value of and desire for access to the conventional sources of capital.<sup>248</sup> The creation of alternative, and reinterpretation of

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245. Hagedorn, *Gang Violence*, *supra* note 44, at 368.

246. KNOX, *supra* note 187, at 24.

247. *Id.*

248. Scott H. Decker & Janet L. Lauritsen, *Leaving the Gang*, in *GANGS IN AMERICA III*, at 51, 65 (C. Ronald Huff ed., 2002).

mainstream, capital appears to be a function of perceived necessity.<sup>249</sup> As the discussion that follows demonstrates, basic property values lie at the core of this capital acquisition project, and gang injunctions primarily target those values.

## 2. PROPERTY THEORY & GANG INJUNCTIONS

Exploring the idea of property—that is, what does the concept mean and what does it have to offer as an independent unit of analysis?<sup>250</sup>—is a primary task of theoretical property inquiries in law, politics, economics, and philosophy.<sup>251</sup> Property theorists have drawn a fault line between ostensibly lay understandings of property-as-things<sup>252</sup> and legalistic “bundle of sticks”<sup>253</sup> formulations.<sup>254</sup> Others portray the same line as property, defined as the relationship of a person to an

249. Providing an account of the capitalist entrepreneurialism intrinsic in modern street gangs is not meant to legitimize the socially unattractive externalities they create or delegitimize legal efforts to regulate gangs. Again, the goal of the preceding is to transport the analysis of gangs from a criminological terrain to the market context in which equivalent questions are normally addressed.

250. Among the most recognized work attacking the viability of property is Thomas C. Grey, *The Disintegration of Property*, in 22 PROPERTY NOMOS 69 (J. Roland Pennock & John W. Chapman eds., 1980); see also Edward L. Rubin, *Due Process and the Administrative State*, 72 CALIF. L. REV. 1044, 1086 (1984) (“[P]roperty is simply a label for whatever ‘bundle of sticks’ the individual has been granted.”); Joan Williams, *The Rhetoric of Property*, 83 IOWA L. REV. 277, 297 (1998) (“Labeling something as property does not predetermine what rights an owner does or does not have in it.”). *But see* STEPHEN R. MUNZER, A THEORY OF PROPERTY 31–36 (1990) (rejecting the argument that property is “too fragmented” for a general theory).

251. See GREGORY S. ALEXANDER & EDUARDO M. PEÑALVER, AN INTRODUCTION TO PROPERTY THEORY, at xi (2012) (defining competing theories of property as “different understandings of what private property is, why we have it, and what its property limitations are”).

252. Grey, *supra* note 250, at 69.

253. The origins of the metaphor are not entirely clear, but it is popularly believed to have been inspired by Wesley Hohfeld’s analysis of rights and A. M. Honoré’s description of the incidents of ownership. J.E. Penner, *The “Bundle of Rights” Picture of Property*, 43 UCLA L. REV. 711, 712 (1996).

254. See STEPHEN R. MUNZER, *Popular and Sophisticated Conceptions of Property*, in A THEORY OF PROPERTY, *supra* note 250, at 15 (contrasting the “popular conception” of property as things with the “legal conception” of property as relations); BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 26–29, 97–100 (1977) (contrasting the definition of property held by the Scientific Policymaker with that of the Ordinary Observer); CAROL M. ROSE, PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY, AND RHETORIC OF OWNERSHIP 1–2 (1994). For the legal transition from “things” to the “bundle of rights,” see Michael A. Heller, *Three Faces of Private Property*, 79 OR. L. REV. 417, 429–31 (2000). See also GREGORY S. ALEXANDER, COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776–1970, at 37–41 (1997).

entity,<sup>255</sup> versus property, defined as the relationship among persons with respect to entities.<sup>256</sup> From either side of these intellectual divides, the gang capital project described above can be logically understood as creating a parallel system of property.

Carving out a space of commonality among the competing property *conceptions*, Jeremy Waldron defines the *concept* of property as “a system of rules governing access to and control of material resources.”<sup>257</sup> Within the normative community established by the gang, resources (in the form of the alternative capital infused with value for the gang) are allocated according to formal and informal rules.<sup>258</sup> Even more elementarily, under the property-as-entity conception, land is a paradigmatic instance of property.<sup>259</sup> The calculated strategic outcome of gang territoriality is to superimpose the gang as owner—in straightforward Blackstonian terms<sup>260</sup>—of the land constituting its territory. Likewise, gang behavior unequivocally satisfies or attempts to satisfy most of the incidents of ownership considered characteristic of most property systems, including the right to possess, the right to use, the duty to prevent harm, and “residuarity.”<sup>261</sup>

In addition to satisfying traditional property definitions, gang capital is consonant with a line of contemporary scholarship that

255. Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 358 (2001) (defining the *in rem* character as the “distinctive type of right to a thing, good against the world”).

256. RESTATEMENT (FIRST) OF PROP. ch. I, intro. note (1936).

257. Jeremy Waldron, *What Is Private Property?*, 5 OXFORD J. LEGAL STUD. 313, 318 (1985). This definition has been generalized away from physical or material resources to cover, more generally, “resources that human beings need in order to survive and to flourish.” Gregory S. Alexander & Eduardo M. Peñalver, *Properties of Community*, 10 THEORETICAL INQUIRIES L. 127, 128 (2009) (citing Waldron, *supra*).

258. David M. Kennedy, *Taking Criminology Seriously: Narratives, Norms, Networks, and Common Ground*, in YOUTH GANGS AND COMMUNITY INTERVENTION 206, 211, 213 (Robert J. Chaskin ed., 2010); Vigil, *supra* note 235, at 421.

259. Cf. Eduardo Moisés Peñalver, *Is Land Special? The Unjustified Preference for Landownership in Regulatory Takings Law*, 31 ECOLOGY L.Q. 227, 231 (2004).

260. Blackstone famously defines property as “that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.” 2 WILLIAM BLACKSTONE, COMMENTARIES \*2 (1766).

261. Anthony M. Honoré, *Ownership*, in OXFORD ESSAYS IN JURISPRUDENCE 107, 113 (A.G. Guest ed., 1961) (listing and explaining property incidents). It would be tautological to conclude that gang capital is not property because it fails to state Honoré’s *prima facie* case defining property as “the greatest possible interest in a thing which a mature system of law recognizes.” *Id.* at 108. Gangs also satisfy Roscoe Pound’s bundle of rights: possession, exclusion of others, use, disposition, enjoyment, and destruction. Roscoe Pound, *The Law of Property and Recent Juristic Thought*, 25 A.B.A. J. 993, 997 (1939).

develops the way property not only organizes and incentivizes—its instrumental role—but also its intrinsically valuable function as constitutive of self, personality, community, and freedom.<sup>262</sup> The surface form of property creates a descriptively compelling connection to gang capital, but its deep structure provides a normative foundation for countenancing that connection.

*a. Property as valuable resource*

Charles A. Reich charted the first steps on this course in *The New Property*.<sup>263</sup> He viewed property in traditional terms as “guard[ing] the troubled boundary between the individual and the state,”<sup>264</sup> concluding that it facilitated the individual’s ability to control his own life,<sup>265</sup> which ability directly and inextricably connects to the acquisition and control of wealth.<sup>266</sup> However, Reich observed a change<sup>267</sup> in the nature of wealth from things to status derived from a relationship to the state.<sup>268</sup> By 1964, when he was writing, traditional land or physical asset-based wealth had been and was increasingly being replaced by new sources, key among them government-created sources, like largess.<sup>269</sup> These new sources of wealth performed the traditional functions of land-as-property—“maintaining independence, dignity and pluralism in society by creating zones within which the majority has to yield to the owner.”<sup>270</sup> As a result, Reich argued, new wealth should be accorded

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262. An alternative catalogue of these intrinsic functions might be that the “right of property is not simply an economic right . . . property rights are also about self-expression, self-governance, belonging, and civic participation.” GREGORY S. ALEXANDER, *THE GLOBAL DEBATE OVER CONSTITUTIONAL PROPERTY: LESSONS FOR AMERICAN TAKINGS JURISPRUDENCE* 67 (2006).

263. Reich, *supra* note 25.

264. *Id.* at 733. Reich’s definition of property aligns with the *in rem*/property-as-things definition. *Id.* at 739 (“A man who has property has certain legal rights with respect to an item of wealth.”).

265. Reich later argued that his interest was to collapse the distinction among the constitutional categories of “life, liberty, and property,” which is at least implicitly a key insight of classical liberal thought. *See id.* at 733, 786–87.

266. *Id.* at 733.

267. It would probably be more accurate to describe Reich’s “change” as his recognition of facts that always were.

268. Reich, *supra* note 25, at 733.

269. In his original piece, Reich suggested, but did not explore, other new forms of wealth, including private business franchises, corporate equity, and private organization membership. *Id.* at 786. The connection among these sources of “wealth” and Bourdieu’s capital taxonomy is clear.

270. *Id.* at 771. This function was closely tied to Reich’s acceptance of the idea that power over the means of subsistence is functionally equivalent to power over his will. *Id.* at 787.

the same protections as (i.e., be treated like) property.<sup>271</sup> Reich's novel descriptive and prescriptive moves operationalized the idea that property cannot be understood outside of its social context. Property is a deliberate social construct that can be wielded to promote societal interests.<sup>272</sup>

*b. Property as personhood*

Notwithstanding her disavowal of Reich's functional approach as undermining the value of property as a concept,<sup>273</sup> the work of Margaret Jane Radin, beginning with *Property and Personhood*,<sup>274</sup> provides a theoretical foundation for and refinement of new property. Reich saw wealth in the form of property as key to individuality.<sup>275</sup> Radin identifies which wealth is infused with this special individuation power and refines the connection between Reich's individuality and property through her qualified adoption of Hegel's philosophy. Her main goal was to elaborate the intuitive notion that "[m]ost people possess certain objects that they feel are almost part of themselves."<sup>276</sup> In so doing, Radin categorized property as either "fungible" or "personal."<sup>277</sup> Fungible property is valuable for instrumental reasons,

271. *Id.* at 771.

272. Property as a social construct has clear classical antecedents. *See, e.g.*, DAVID SCHULTZ, PROPERTY, POWER, AND AMERICAN DEMOCRACY 19 (1992) (quoting Blackstone as saying "a conventional institution created by law, habit, or the passage of time . . . . [The] rules prescribing its use and transfer were determined by society"); *see also* JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM 248 (1990) ("[P]roperty is, of all the basic rights, perhaps most obviously the creation of the state.").

273. Radin, *supra* note 26, at 989 n.111.

274. Though the discussion here relies primarily on *Property and Personhood*, Radin has refined, developed, and evolved the theory she developed there in a series of well-recognized articles and books. *See* Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987); Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667 (1988) [hereinafter Radin, *The Liberal Conception of Property*]; MARGARET JANE RADIN, REINTERPRETING PROPERTY (1993) [hereinafter RADIN, REINTERPRETING PROPERTY]; RADIN, CONTESTED COMMODITIES, *supra* note 9; Margaret Jane Radin, *Property Evolving in Cyberspace*, 15 J.L. & COM. 509 (1996).

275. Reich, *supra* note 25, at 771.

276. Radin, *supra* note 26, at 959.

277. *Id.* at 960. This is a somewhat unfortunate nomenclature in the property context, as it is easy to confuse the term with the more popular term for personalty, which is also "personal property." Here, Radin's personal property will be described as "property for personhood" or "personality property," a term which Radin later adopted for the same concept. As discussed below, the term "identity property" will be used to connote the broader notion of property on which the article's arguments rely, of which Radin's personality property forms only one part. *See infra* note 326.

i.e., to enable the owner to do something else.<sup>278</sup> It can be replaced with property that equally meets the purposes of the owner. Personal property, by contrast, has value *per se* because it is “bound up” with the owner.<sup>279</sup> The loss of this property “causes pain that cannot be relieved by the object’s replacement.”<sup>280</sup> Grounded in the Hegelian justification of property rights as an expression of the self (“property is the *embodiment* of personality”),<sup>281</sup> Radin asserts, “to achieve proper self-development—to be a person—an individual needs some control over resources in the external environment.”<sup>282</sup> The purpose of property rights, then, is to secure such control.<sup>283</sup> Thus, property for personhood, i.e., that property “important to the freedom, identity, and contextuality of people”<sup>284</sup> is a fundamental category that deserves greater legal protection:

Where we can ascertain that a given property right is personal, there is a *prima facie* case that that right should be protected to some extent against invasion by government and against cancellation by conflicting fungible property claims of other people. This case is strongest where without the claimed

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278. Radin, *supra* note 26, at 960.

279. *Id.* A one-dollar bill is a clear example of the distinction. In most cases, a one-dollar bill is fungible property, replaceable with any other one-dollar bill or any property worth one dollar. But a particular one-dollar bill may be the personality property of a business proprietor if, say, it is the first dollar earned in her commercial enterprise. The proprietor’s sentimental attachment to the physical dollar bill transforms it from a replaceable utilitarian good into part of the proprietor’s sense of self. Examples of personal property used by Radin include the home (to a person living in it), *id.* at 967, a wedding ring (to the bride or groom), *id.* at 959, and body parts, *id.* at 966.

280. *Id.* at 959.

281. HEGEL’S PHILOSOPHY OF RIGHT § 51 (T. M. Knox trans., Oxford Univ. Press 1942) (1821). Hegel’s theory is generally understood to mean that one acquires property by imposing one’s will upon it. Note that Radin does depart from Hegel on several key points. Indeed, she would later assert that her reliance on Hegel was not intended as theoretical foundation but as an illustration of the resonance between their positions, which she termed “a suggestive text.” See RADIN, REINTERPRETING PROPERTY, *supra* note 274, at 8. For a review of these departures, see ALEXANDER & PEÑALVER, *supra* note 251.

282. Radin, *supra* note 26, at 957.

283. An alternative construction of that control focuses on the control of the social relations connected to an object—the relationship among individuals—rather than the particular connection a person has to the object itself. This tracks Radin’s insights from her distinctly *in rem* understanding of property to a relational understanding thereof. See Lisa M. Austin, *Person, Place, or Thing? Property and the Structuring of Social Relations*, 60 U. TORONTO L.J. (2010). This interesting alignment of Radin’s theory does not change its underlying import.

284. Radin, *The Liberal Conception of Property*, *supra* note 274, at 1686.

protection of property as personal, the claimants' opportunities to become fully developed persons in the context of our society would be destroyed or significantly lessened, and probably also where the personal property rights are claimed by individuals who are maintaining and expressing their group identity.<sup>285</sup>

Radin's personality theory has garnered extensive attention, and the jurisprudence it has inspired and influenced extends far beyond the scope of this article.<sup>286</sup> However, several lines of recent scholarship have (often only implicitly) extended the property-as-personhood premise to several important contexts and concepts that further the present discussion.<sup>287</sup> In that respect, while Radin's work was distinctly oriented toward "personal individuation,"<sup>288</sup> this scholarship explores the connections among property and communities and groups.

In his study of the costs that attach to the benefits of property ownership, Eduardo Peñalver helps explain how property rights are fundamental to the constitution of communities.<sup>289</sup> It is well established that property is a necessary and useful concept only in a community context. "In the world of Robinson Crusoe property rights play no role."<sup>290</sup> However, Peñalver's insight advances a different proposition: property "binds individuals together into normative communities."<sup>291</sup> To develop this point, he accepted the centrality of exit—defined as "the right to withdraw or refuse to engage; the ability to dissociate, to cut oneself out of a relationship with other persons"<sup>292</sup>—to the types of

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285. Radin, *supra* note 26, at 1014–15.

286. For a review of the influential works and authors engaging Radin's concept, see Jeffrey Douglas Jones, *Property and Personhood Revisited*, 1 WAKE FOREST J.L. & POL'Y 93, 94–98 (2011).

287. Personality theory has other important implications unrelated to the present discussion.

288. For use of the term, see RADIN, *CONTESTED COMMODITIES*, *supra* note 9, at 56. Though Radin acknowledges the importance and possible necessity of "group cohesion," she highlights collective, group, and community interests as "a difficult case for the personhood perspective," which she blames on law's failure to advance a convincing theory of group rights. Radin, *supra* note 26, at 1011–12. Her brief discussion implies an aggregative conception of group interests (i.e., the interests of the group is the sum of the individual interests of its members) that breaks down when individual group members advance conflicting claims. *Id.* at 1011–13 (citing *Vill. of Belle Terre v. Boraas*, 416 U.S. 1 (1974)).

289. Eduardo Peñalver, *Property As Entrance*, 91 VA. L. REV. 1889 (2005).

290. Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 347 (1967).

291. Peñalver, *supra* note 289, at 1972.

292. *Id.* at 1891 (quoting Hanoch Dagan & Michael Heller, *The Liberal Commons*, 110 YALE L.J. 549, 567–68 (2001)).

control or autonomy that animate utilitarian property perspectives, but he reversed the analysis to determine the role of property in facilitating *not exit from* the demands of a community *but access to* that community and the social and legal obligations concomitant therewith. Peñalver called the inductive aspect of the reciprocity between individuals and communities mediated by things “property as entrance.”<sup>293</sup>

The normative underpinnings of property as entrance are anchored in an Aristotelian community theory of property advanced by Peñalver and Gregory Alexander.<sup>294</sup> That theory conceives of people as social and political animals inherently dependent and interdependent on other people to develop the uniquely “human capacities” necessary for “human flourishing,”<sup>295</sup> a rich concept that “must include at least the capacity to make meaningful choices among alternative life horizons.”<sup>296</sup> That capacity justifies the value and effort invested in individual autonomy.<sup>297</sup> In the communitarian framework, property facilitates access to the human networks that allow an individual to become fully human.<sup>298</sup>

Such community access, however, is mediated by the socio-cultural meanings attached to property.<sup>299</sup> Among the denominative or expressive functions of property is its ability to signal the status of the property owner in the community. Nestor Davidson

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293. *Id.*

294. Alexander & Peñalver, *supra* note 257. Alexander has elaborated this concept of community. *See generally* ALEXANDER, *supra* note 262.

295. Without providing an exhaustive analysis of the “well-lived life” implied by human flourishing, Peñalver and Alexander broadly include at least four capabilities necessary to the pursuit thereof: life, freedom, practical reason, and affiliation. Alexander & Peñalver, *supra* note 257, at 137–38.

296. *Id.* at 134–35. They further explain the contours of “meaningful” decision-making within a robust conception of freedom as including both the ability to discern the “salient differences” among choices and “deliberate deeply” about their relative value. *Id.* at 135. For an elaboration of this idea in the property context, see Colin Crawford, *The Social Function of Property and the Human Capacity to Flourish*, 80 *FORDHAM L. REV.* 1089 (2011).

297. Alexander & Peñalver, *supra* note 257.

298. Alexander and Peñalver’s prescriptive conclusion asserts that their communitarian/human flourishing analysis provides a valuable heuristic for resolving property questions. *Id.* at 130. León Duguit’s view of property as a social function in service of community solidarity reaches a more rigid conclusion that property should only be protected where it fulfills this social function. *See* Sheila R. Foster & Daniel Bonilla, *The Social Function of Property: The Comparative Perspective*, 80 *FORDHAM L. REV.* 1003, 1004–07 (2011).

299. Jeffery Douglas Jones advances the importance of socio-cultural meaning to suggest that the relevant unit of analysis is the way property advances specific “sociocultural meanings grounded in specific object relationships” rather than property for personhood. Jones, *supra* note 286, at 127–31.

has explored the manifestation of this role on several levels.<sup>300</sup> In its thin form, the expressive function of property is to denote the relationship of a party to a valuable resource or the relationship of several parties to each other with respect to that resource.<sup>301</sup> Property's thick expressive role is to shape and reinforce the economic, social, and cultural hierarchies that define mutual obligations and set the borders of social relations.<sup>302</sup> The type, volume, and composition of an individual's ownership situate that individual horizontally and vertically in the social order.<sup>303</sup> Thus, property not only constitutes communities, it orders them.

Though they did not necessarily intend to contribute to Radin's personality theory, the ideas represented by the work of Peñalver, Alexander, and Davidson extend her insights about the ontological role of property beyond the individual to the body politic. Other scholars deliberately extend Radin's personality theory to collectivities, like insular minorities and indigenous peoples.<sup>304</sup>

For example, Kristen Carpenter, Sonia Katyal, and Angela Riley draw an intellectual divide between standard market-amenable visions of property and a "more relational vision" that seeks to honor interests related to property (independent of ownership status) that promote various (and possibly nonmarket) values to advance a theory of

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300. See generally Nestor M. Davidson, *Property and Relative Status*, 107 MICH. L. REV. 757 (2009).

301. These are the alternative basic definitions of property that are often the core of the property theory debate. See *supra* notes 250–62 and accompanying text.

302. Davidson, *supra* note 300.

303. This function clearly correlates to the Bourdieuan idea of capital facilitating social mobility. See *supra* notes 220–30 and accompanying text. Davidson explores the connection between social mobility and property with respect to implications of stability and instability in the institution of property and how the law can or should be used to influence those implications. Davidson, *supra* note 300, at 807–10.

304. See, e.g., Kristen A. Carpenter, *Real Property and Peoplehood*, 27 STAN. ENVTL. L.J. 313, 313 (2008); Derek Fincham, *The Distinctiveness of Property and Heritage*, 115 PENN ST. L. REV. 641, 641 (2011); Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 75 B.U. L. REV. 559, 562 (1995) (defining cultural property as tangible objects and intangible expressions that capture a group's identity); John Moustakas, *Group Rights in Cultural Property: Justifying Strict Inalienability*, 74 CORNELL L. REV. 1179, 1182–84 (1989) (first suggesting the application of Radin's theory to group ownership of cultural property); Madhavi Sunder, *Property in Personhood*, in RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE 164, 164–65 (Martha M. Ertman & Joan C. Williams eds., 2005) (applying Radin's theory to "subordinated groups" seeking protection for their intellectual property rights to songs, folklore, agricultural knowledge, and religious symbols).

property for “peoplehood.”<sup>305</sup> This theory directly extends Radin’s descriptive argument. Just as some property should be entitled to enhanced protection because it performs the personhood function, Carpenter, Katyal, and Riley argue, “certain lands, resources, and expressions are entitled to legal protection as cultural property because they are integral to the group identity and cultural survival of indigenous peoples.”<sup>306</sup> Normatively, the move is slightly different. In line with the broader body of Radin’s work, which uses her personality theory to contest almost blanket (and certainly default) market valorization in favor of context-specific inalienability,<sup>307</sup> they reject the still-standard perspective that property values are universally “commodifiable” and “commensurable” and, thus, alienable.<sup>308</sup> However, they also challenge the traditional ownership model as the nexus of property interests.<sup>309</sup> Instead, “property for *peoplehood*” contemplates “stewardship” as an alternative nexus.<sup>310</sup> That concept illustrates the potential functions, manifestations, and protections of property outside strict ownership, which is capable of promoting various rights and obligations with respect to property without necessarily requiring any legal title thereto.<sup>311</sup>

Radin began a discourse that demonstrates the connection between being a fully actualized person and property. The extension of her work into community and group contexts permits the distillation of an enriched version of her ontological thesis: There is a constitutive relationship among property, individuality, community, status, and group identity that is central to vocational humanity (i.e., that which is necessary to go about the business of being human).<sup>312</sup> These

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305. Kristen A. Carpenter, Sonia K. Katyal & Angela R. Riley, *In Defense of Property*, 118 *YALE L.J.* 1022, 1027 (2009).

306. *Id.* at 1028.

307. *See supra* note 274.

308. Carpenter, Katyal & Riley, *supra* note 305, at 1047.

309. *Id.*

310. *Id.* at 1046.

311. *Id.* at 1124.

312. The term “vocation” is meant to evoke Paulo Freire’s understanding that the ontological vocation of becoming more fully human (“humanization”) is the central problem of humanity. PAULO FREIRE, *PEDAGOGY OF THE OPPRESSED* (Myra Bergman Ramos trans., 1970) (1968). Freire places education at the core of this vocation and freedom (which Freire defines, in terms complementary to those advanced by Aristotle, as the capacity to autonomously and responsibly take control of one’s own life through authentic, critical insights into the social construction of human society, PAULO FREIRE, *Education as the Practice of Freedom*, in *EDUCATION FOR CRITICAL CONSCIOUSNESS* 1, 34, 41 (Myra Bergman Ramos trans., 1974)) as its metric. The work reviewed in the preceding discussion indicates that, at a minimum, property plays a central role in this vocation. The “mythical” connection between property and freedom in legal and

relationships can be advanced and supported through traditional and nontraditional property structures.

*c. Embodied privilege as property*

In her groundbreaking article, *Whiteness as Property*,<sup>313</sup> Cheryl I. Harris created a bridge to directly connect Reich's potentially expansive new property to personality theory. Drawing on Radin's theory and other prevailing conceptions of property, Harris charted the way whiteness (a racial construct signifying the embodiment of privilege but escaping definition in the "thing"-based terms generally applied to traditional tangible and intangible property) theoretically and functionally meets the criteria to be denominated property. Not only does whiteness satisfy traditional conceptions—like James Madison's "every thing to which a man may attach a value and have a right"<sup>314</sup> and Jeremy Bentham's "basis of expectation,"<sup>315</sup> but the historical evolution of property rights reinforces that denomination by according protection to the strongest sticks of the axiomatic property bundle—alienability, use, and exclusion.<sup>316</sup> In Harris' account, notwithstanding its lack of "thing-ness," because whiteness is accorded the legal attributes of property, it plays the same role as Radin's property for personhood in the development of individual and group identities and to the constitution and organization of communities.<sup>317</sup>

Harris' work introduces three elements to the robust framing of property being developed here. First, Harris showed that new property had already been constituted in American law in the form of whiteness. In so doing, she concretized Reich's aspirational break from the entity-centered property framework by setting forth how a construct as ethereal as race had been imbued with the powerful (even if poorly defined) substance of property traits and protections.<sup>318</sup> The American reification of race through property law suggests, in the Reichian tradition, that some values can become so contextually important as to beg institutional recognition, which may or may not be formalized.

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political discourse seems to indicate that freedom (however defined) remains an appropriate metric for property as a feature of vocational humanity.

313. Harris, *supra* note 27.

314. James Madison, Political Essay: Property (Mar. 29, 1792), in *SELECTED WRITINGS OF JAMES MADISON* 222, 223 (Ralph Ketcham ed., 2006).

315. JEREMY BENTHAM, *Of Property*, in 1 *THEORY OF LEGISLATION* 137, 137 (R. Hildreth trans., Boston, Weeks, Jordan & Co. 1840) (1802).

316. Harris, *supra* note 27, at 1731.

317. *Id.* at 1709.

318. *Id.* at 1731–37.

Second, whiteness as property extended Radin's personality theory. While Radin established an important link between vocational humanity and property, Harris drew the essential epistemological line, connecting property—writ in her broader terms—to how people<sup>319</sup> understand and know themselves and their relationships to others (and to the government). This epistemological role is linked to property's individuating authority because "[p]eople form their sense of self at least in part by comparison to others, with property serving as a particularly important and informational metric for that comparison."<sup>320</sup> Davidson examined the implications of property's epistemological power to organize communities in ways that are important to a mutable identity. His focus on the fetishism of ownership illustrates this point: property communicates where an individual stands in the social order at any given moment, and more property and better property suppositions an individual in that order.<sup>321</sup> Implicit is the notion that every individual can potentially change the composition and character of her property to change her position in the social hierarchy. The implication of Harris' arguments in this respect is that property also communicates the degree of positionality change that is possible for an individual. Harris' whiteness is a limited, excludable, and extremely

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319. Harris focused exclusively on whiteness as having been transformed into property. Because she considered formal (though only implicit) legal recognition—a proxy for value—as the lynchpin of whiteness as property, she expressly excludes from her construct unvalued subaltern identities. This position is reasonable since the reinterpretations of property that are advanced by Harris (as well as Radin and Reich) find inspiration from understandings of the idea of property as a system for assigning rights to valued resources. However, Harris' insights have inspired theoretical extensions of her idea to Blackness and race, generally, as identity categories that exhibit value in contemporary law in distinct but analogous ways to whiteness. *E.g.*, Jim Chen, *Embryonic Thoughts on Racial Identity As New Property*, 68 U. COLO. L. REV. 1123, 1157–59 (1997); Mitchell F. Crusto, *Blackness as Property: Sex, Race, Status, and Wealth*, 1 STAN. J. C.R. & C.L. 51 (2005); Sheldon Bernard Lyke, *Diversity as Commons*, 88 TUL. L. REV. 317 (2013). For proceedings from a 2014 UCLA School of Law symposium discussing the impact of Harris' seminal article after twenty years, see *7th Critical Race Studies Symposium: Whiteness as Property: A 20-Year Appraisal – Main Panels*, UCLA L., <http://law.ucla.edu/centers/social-policy/critical-race-studies/events/annual-symposium/2014-symposium-main-panels/> (last visited Nov. 7, 2015); *7th Critical Race Studies Symposium: Whiteness as Property: A 20-Year Appraisal – Concurrent Sessions*, UCLA L., <http://law.ucla.edu/centers/social-policy/critical-race-studies/events/annual-symposium/2014-symposium-sessions/> (last visited Nov. 7, 2015). On the strength of these expansions, this article takes the key contribution of Harris' work in this respect to be generally applicable to a diverse range of identity frames. Of course, the precise task of elaborating whether and how such identity frames do or could constitute property is beyond the scope of this article.

320. Davidson details the important function of property in the development of individual identity. See Davidson, *supra* note 300, at 782–88.

321. *Id.*

valuable resource. Ownership thereof automatically suprapositions the owner, and nonwhite group members will indelibly occupy less favorable social positions than individuals who have an otherwise comparable mix of property.<sup>322</sup>

Third, Harris plainly showed that neither new property nor property for personhood were benign, neutral concepts. The epistemological function of property fixes whiteness as the most important form of property for personhood. It divides the community into subjects–objects, citizens–others, persons–nonpersons, insiders–outsiders. Jane Baron raised the same specter as an occluded “dark side” of the American private property scheme in her provocative short essay on homelessness.<sup>323</sup> There, Baron candidly concluded that the personhood function of property presents the inherent possibility that some individuals lacking property (like the homeless), so-called no-property holders, will be unable to achieve full personhood.<sup>324</sup> Jeremy Waldron, a legal philosopher who has also dedicated considerable attention to homelessness as a property question, frames the same issue not in personhood terms but in terms of community membership.<sup>325</sup> The ultimate concern, however, is complementary given the connection between personhood and community membership explored by Peñalver and Alexander. Harris’ insights make clear that Baron’s pronouncement is graduated not only by the amount of property held by an individual, which was the concern of Baron and Waldron, but also by the quality of the property. Certain property (e.g., whiteness) has a particularly large hierarchical advantage. More important, both the quality and quantity of property may be distributed to favor or disfavor certain groups. Thus, Harris provided a needed critical lens to unveil the hegemonic imbalance between the idea of ontological property and its actualization. In other words, she explained that legal epistemologies gave access to personality property in categorically limited ways.

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322. Again, this is the same position that Bourdieu advances in nonracialized terms with respect to capital. In his terms, access to identity-based networks impacts the availability of the full range of capital that provides the basis for social mobility. *See supra* notes 220–30 and accompanying text.

323. Jane B. Baron, *Property and “No Property,”* 42 HOUS. L. REV. 1425, 1447 (2006).

324. *Id.*

325. Jeremy Waldron, *Community and Property – For Those Who Have Neither*, 10 THEORETICAL INQUIRIES L. 161, 185–86 (2009).

*d. The endemicity of the property instinct*

What happens, then, when people are excluded from acquiring those types of property, i.e., “identity property,”<sup>326</sup> connected with vocational humanity? The Radin-Harris route of ontological and epistemological property analysis developed here undergirds one answer to that question that completes the gang property narrative being advanced in this article.

Radin argued that property is crucial to vocational humanity, so it should be granted high degrees of respect.<sup>327</sup> There is a serious danger—on which Harris based her *Whiteness As Property* argument<sup>328</sup>—that failure to understand power and subordination histories and constructs will drive that protection in ways that reproduce and entrench categorical positional inequality. In *Property Outlaws*, Peñalver and Katyal map how the centrality of property to both vocational and epistemological identity creates tension among politico-legal, individual, and community incentives.<sup>329</sup> Vocational humanity creates a property creation instinct endemic, at least, to property-based societies, but the way property is organized may push individuals out of that system. That centrifugal motion incentivizes those “excluded from participation in the system of ownership to challenge both existing property rules and established property entitlements.”<sup>330</sup> Those pushed outside the boundaries of ownership also have little political voice, so among the only avenues of relief from this marginalization is the violation of legally sanctioned property entitlements: “the simple act of taking or occupying.”<sup>331</sup>

Peñalver and Katyal reject the stock disapprobation of such transgressions, which are normally assumed to be universally harmful to society and the institution of property (except, possibly, in the circumspect case of adverse possession).<sup>332</sup> Instead, they explain that such rogue property acquisition has historically played an important

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326. This term is meant to refer to that property that implicates one’s being more fully human (e.g., Radin’s personality property), as well as those property interests that impact one’s identity as such (e.g., taking into account Harris and Davidson’s insights).

327. Radin, *supra* note 26, at 990.

328. See Harris, *supra* note 27, at 1709.

329. Peñalver & Katyal, *supra* note 28, at 1132–33; see Dorothy A. Brown, *Shades of the American Dream*, 87 WASH. U. L. REV. 329, 378 (2009) (noting the importance of wealth creation for communities of color).

330. Peñalver & Katyal, *supra* note 28, at 1132 (citing Joseph William Singer, *The Ownership Society and Takings of Property: Castles, Investments, and Just Obligations*, 30 HARV. ENVTL. L. REV. 309, 310 (2006)).

331. *Id.* at 1132–33.

332. *Id.*

role in realigning stale property settlements in ways that have redistributive effects that accord with evolved conceptions of justice, fairness, or efficiency.<sup>333</sup>

*e. Gangs as identity property outlaws*

Although the authors do not make any claim to engage each other in the ways suggested here, the scholarship explored above establishes four steps that clearly connect gangs and property:

- (1) Reich painted an image of property as a social-legal construct that has the meaning provided to it, which opened the doors for expansive, teleological analyses of property.
- (2) Radin demonstrated how Reich's expansive notion of property is inextricably connected to any ontology and the pursuit of fulfillment according thereto.<sup>334</sup>
- (3) Harris linked ontological property to less fixed concepts, like identity, and provided a needed critical lens that illustrated how the distribution of such property is imbalanced.
- (4) Finally, Peñalver and Katyal suggest that property transgression is a natural consequence of the imbalanced distribution of property that forms part of a recursive process of potentially ameliorative resistance to and disobedience of established norms.

Following this constructed train of thought, the gang capital project described here constitutes a transgressive engagement with identity property. Thoroughly excluded from meaningful access to one system of identity property, gangs have created their own parallel system in which they are able not only to acquire identity property that is valuable within that parallel system but also to attempt to compel their admittance into the mainstream system.

As described above, within the gang property system, a gang asserts ownership in very traditional ways. Graffiti marks boundaries in the same way fences and "Keep Out" signs do. Gangs' dominance of a neighborhood creates a level of freedom and privacy—Peñalver's property as exit—traditionally associated with private property ownership. Territorial violence is merely part of a Wild West-style

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333. *Id.*

334. See, for a similar recognition, Michael B. Kent, Jr. & Lance McMillian, *The World of Deadwood: Property Rights and the Search for Human Identity*, 20 S. CAL. INTERDISC. L.J. 489, 518–19 (2011).

assertion of the right to exclude.<sup>335</sup> Moreover, their claiming of territory and expression of ownership over that territory has important identity-affirming consequences. Gangs' assertion of dominance over geographic territory is bolstered by the way they assert ownership over their personal property, which they have imbued with unique symbols. This use has especially powerful identity-affirming qualities, where access to the identity-affirming values of real property is limited. The expressive function of gang regalia is a topic of inconclusive debate. But, where access to other legitimate forms of identity property is limited, such personal property plays a very important role as identity property. In many ways, it is a way to carry home wherever one goes and claim interest in and exclude others from an intangible, intellectual space.<sup>336</sup>

This property-affirming framing of gang conduct does not countenance gangs or their illegitimate (or de-legitimized) assertion of ownership or stewardship over third-party or community resources.<sup>337</sup> The goal is to reveal how that illegitimacy, though nominally criminal or tortious, is fundamentally about property. This recognition changes the nature of the gang injunction-as-property debate. The important inquiry is not how to protect valid property interests from decimation by corporatized criminals. Rather, it is how to balance competing property interests. The legitimate interests of safety zone residents of unfettered access to and use of their own and common property within the zone compete with the also legitimate use of the same by gang members. The legitimized identity property interests of residents are pitted against the delegitimized shadow property claims of gangs.

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335. The use of the term "Wild West" is meant to evoke, not glorify, a particular and popular reading of life on the nineteenth century American frontier in which violence was a part of the transition to civilization. Note that prevailing scholarly accounts frame this image more complexly. *See, e.g.*, TERRY L. ANDERSON & PETER J. HILL, *THE NOT SO WILD, WILD WEST: PROPERTY RIGHTS ON THE FRONTIER* (2004) (recasting frontier history as cooperative). Critical accounts, unsurprisingly, pinpoint the period's violence in the government's policies toward native peoples. *See, e.g.*, Thomas J. DiLorenzo, *The Culture of Violence in the American West: Myth Versus Reality*, 15 INDEP. REV. 227 (2010).

336. D. Benjamin Barros has explored this distinction between the idea of home and its physical location through different means and toward different ends. D. Benjamin Barros, *Home As a Legal Concept*, 46 SANTA CLARA L. REV. 255, 256 (2006) (arguing that only certain types of homes merit the special treatment generally accorded to homes in the law).

337. This article presupposes that, were it to be undertaken, any sustained evaluation of the byproducts of the creation of gang identity property would be net negative, i.e., socially harmful. Admittedly, there is considerable space to challenge this supposition as reproductive of the ideologies (and legitimizing of the systems) of domination and oppression that catalyze the formation of gangs. Those questions will be taken up in a subsequent article.

The preceding discussion of the bases for elevating the property elements above the constitutional and criminological in gang injunction discourse reveals the essential property infrastructure of gang injunctions and frames them as presenting property law questions. Rhetoric, reality, and theory support this view. The following discussion uses the property-centered perspective to suggest one approach to the balancing project that perspective reveals.

#### IV. A PROPERTY-CENTERED ECONOMIC ANALYSIS OF GANG INJUNCTIONS

The rhetorical justification and practical modalities of gang injunctions situate them at the intersection of criminal and property law.<sup>338</sup> In that context, localities use land use management principles to address crime. Indeed, the single quality that makes gang injunctions such an attractive and unique gang control strategy is their functional equivalence to order-maintenance criminal laws freed from the heightened burdens of criminal procedure. However, rhetorical and political, instrumental, and intrinsic and philosophical analyses of gangs and gang injunctions reveal that the mechanism is properly cast as a property tool applied to property questions. The conflict a gang injunction mediates is not gang crime versus host community property rights but normatively legitimized host community property interests versus shadow gang property interests.

A property-infused discourse or concept does not, however, require or even suggest property-based recourse or resolution. Theft is an offense defined in reference to private property; one cannot steal that which is not another's to own.<sup>339</sup> Nevertheless, upon the occurrence of theft, one naturally gravitates to criminal law for redress. Similarly, concepts like trespass, conversion, and nuisance are created and, then, bounded by prevailing notions of property.<sup>340</sup> However, one may prefer that tort or, again, criminal law mechanisms intervene on one's behalf

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338. It bears noting that criminal-property is, strictly read, a false dichotomy. As alluded to below, criminal law is property law when and to the extent it regulates or protects property interests, like a firearm enhancement or the prohibition of theft. However, the dichotomy has been useful thus far to distinguish traditional crime perspectives that emphasize guilty pathologies from property perspectives emphasizing control and creation of space and capital.

339. MAX STIRNER, *THE EGO AND ITS OWN* 223 ("Is the concept 'theft' at all possible unless one allows validity to the concept 'property'? How can one steal if property is not already extant? . . . Accordingly, property is not theft, but a theft becomes possible only through property.").

340. Cf. John A. Lovett, *Progressive Property in Action: The Land Reform (Scotland) Act 2003*, 89 NEB. L. REV. 739, 740 (2011); Brian Sawers, *The Right to Exclude from Unimproved Land*, 83 TEMP. L. REV. 665, 666 (2011).

to resolve issues concerning those property concepts. Thus, the mere reliance on, interconnectivity of, or even structural primacy of property to an issue does not mean that the resolution should sound in property. Nevertheless, among the consequential values of reframing the gang injunction debate in wholly property terms is that space is opened to explore the full range of alternative approaches to addressing the behaviors targeted by gang injunctions and balancing the competing property interests they highlight.

The preceding exposition of gangs as engaged in transgressive identity property creation and reinterpretation relied on several strains of property theory, which were redirected to the ends they served here.<sup>341</sup> However, justifications of property tend to fall more clearly within one of these dominant strains of thought, each of which is associated with certain normative outcomes for property disputes. For example, deontological sources of property, like Lockean labor theories and Hegelian personality theories, favor outcomes in which property more closely approximates inviolability. Consequentialist theories are more flexible. Among the latter, utilitarianism is undisputed as the leading practical justification of property underlying legal policy. That position has been, at least partially, established by the copious body of law and economics scholarship in contemporary property thought. This work provides a systematic approach to considering how the law should allocate and protect competing property interests.

Within law and economics canon, the conceptual framework of property rules, liability rules, and inalienability suggested by Guido Calabresi and A. Douglas Melamed in *Property Rules, Liability Rules,*

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341. This methodology for theoretical exposition was introduced as “bricolage” in the anthropological writings of Claude Lévi-Strauss. CLAUDE LÉVI-STRAUSS, *THE SAVAGE MIND* 16–17 (George Weidenfeld & Nicolson Ltd. trans., Univ. of Chi. Press 1966) (1962), *discussed in* Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 *YALE L.J.* 1225, 1229 (1999) (noting that the term “bricolage,” as used by Lévi-Strauss, means “the assembly of something new from whatever materials the constructor discovered”). Jacques Derrida describes the methodology as follows:

The bricoleur . . . is someone who uses “the means at hand,” that is, the instruments he finds at his disposition around him, those which are already there, which had not been especially conceived with an eye to the operation for which they are to be used and to which one tries by trial and error to adapt them, not hesitating to change them whenever it appears necessary

. . . .

Jacques Derrida, *Structure, Sign & Play in the Discourse of the Human Sciences*, in *WRITING AND DIFFERENCES* 278, 285 (1978) (emphasis omitted). For uses in law, see, for example, Bruno De Witte, *New Institutions for Promoting Equality in Europe: Legal Transfers, National Bricolage and European Governance*, 60 *AM. J. COMP. L.* 49, 69 (2012); Günter Frankenberg, *Constitutional Transfer: The IKEA Theory Revisited*, 8 *INT’L CONST. L.J.* 563, 575–77 (2010); Tushnet, *supra*, at 1285–1306.

*and Inalienability: One View of the Cathedral*<sup>342</sup> continues to be extremely influential through a steady and heavy flow of law and economics and property scholarship that critiques, extends, modifies, and updates the insights they offered.<sup>343</sup> In the original spirit of that work,<sup>344</sup> this Part briefly analyzes the competing property interests of gangs and the communities in which they are situated from the *Cathedral* framework to illustrate how the pertinent considerations Calabresi and Melamed set forth support the counterintuitive claim that local governments should compensate gangs for refraining from gang activity.

#### A. *The View from the Cathedral*

The *Cathedral* can be read as a response to and an extension and elaboration of the legal prescription offered by Ronald Coase in *The Problem of Social Cost*.<sup>345</sup> There, he developed what is now known as the *Coase Theorem*—a foundational principle of law and economics<sup>346</sup>—

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342. Calabresi & Melamed, *supra* note 29.

343. Lee Anne Fennell, *Property and Half-Torts*, 116 YALE L.J. 1400, 1402 (2007).

344. Even though the Calabresi-Melamed framework has been elevated to the level of doctrine, they originally suggested it as one of many possible economic approaches. *See id.* Among the most attractive alternative approaches is the comparative institutional analysis approach advanced by Neil Komesar. *See, e.g.*, Neil K. Komesar, *Exploring the Darkness: Law, Economics, and Institutional Choice*, 1997 WIS. L. REV. 465. Under this approach, rather than apply the Calabresi-Melamed framework, the appropriate step to follow the property framing of gangs would be to examine the institutions potentially capable of addressing the problems associated with gangs and choosing the “best” among what Komesar frames as “imperfect alternatives.” NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 160 (1994) (“The . . . choice is between two highly imperfect alternatives—the best of bad alternatives must be chosen.”). The application of Komesar’s texturizing approach is a task to be taken up in a future article. The *Cathedral* itself has been developed, critiqued, and reworked in persuasive ways. Therefore, it is also possible to run the existing analysis through these latter frameworks. Behavioral economics has begun to contribute to the study of criminogenic cultures. Poverty economics has developed real world labs in which innovative policy responses have been explored. The initial intuition of the present author is that these alternative analytic approaches, as well as approaches outside of economics, would result in a similar set of considerations.

345. R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

346. The Coase Theorem has engendered volumes of literature, which advance weaker and stronger versions of Coase’s core ideas. Although its validity in either version has been questioned and numerous general flaws have been identified, the underlying insight about the law’s potential and proper role where there are transaction costs remains useful. *See, e.g.*, Abraham Bell & Gideon Parchomovsky, *Pliability Rules*, 101 MICH. L. REV. 1, 9 n.23, 10 n.25 (2001) (reviewing some relevant literature).

in his systematic analysis of the role of law in allocation questions. Its basic statement is that, in the absence of externalities (i.e., the costs and benefits of an activity that are not captured by the price), which translate into transaction costs, private bargaining results in economically efficient outcomes regardless of the initial allocation of legal rights or liabilities.<sup>347</sup> Since, however, there is no zero transaction cost world, Coase argued that courts should allocate entitlements directly to the party who would (assuming a zero cost world) purchase the right if not so assigned and would not sell it if it were so assigned.<sup>348</sup>

Calabresi and Melamed elaborated Coase's prescriptive argument by recognizing that the allocation of entitlements actually entailed two decisions: (1) to whom to grant the entitlement<sup>349</sup> and (2) how to protect the entitlement once granted.<sup>350</sup> Then, they offered a tripartite taxonomy of entitlements based on the type of protection conferred thereon, two of which form the core of the *Cathedral* framework:<sup>351</sup> property rules and liability rules.<sup>352</sup> Property-rule-protected entitlements cannot be destroyed unless the right is purchased at a price agreed to by its holder. Liability-rule-protected entitlements, in contrast, may be destroyed whenever someone is willing to pay an objectively determined price. Calabresi and Melamed's astute realization was that "bilateral symmetry"<sup>353</sup> permits property- and liability-rule protection to be afforded to either party to an interest conflict,<sup>354</sup> which results in a complete matrix of possible outcomes. Though Calabresi and Melamed

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347. *Id.* at 9–10. In other words, in a zero-transaction-cost world, all costs and benefits of an activity are captured by the price. That is, there are no externalities presenting obstacles to private bargaining.

348. *Id.* at 15–16.

349. Calabresi & Melamed, *supra* note 29, at 1090 ("Whenever a state is presented with the conflicting interests of two or more people, or two or more groups of people, it must decide which side to favor.").

350. *Id.* ("Having made its initial choice, society must enforce that choice. Simply setting the entitlement does not avoid the problem of 'might makes right'; a minimum of state intervention is always necessary.").

351. The third entitlement form, "inalienability," is said to arise when transfer is impermissible, even where a buyer and seller are willing. *Id.* at 1092. Inalienability rules are key to commodification theorists like Radin and are arguably the core of the criminal law. *See, e.g.,* Radin, *supra* note 26, at 984–86.

352. Entitlements protected by inalienability cannot be transferred at all, entitlements protected by a property rule can be transferred if both parties to the transaction consent, and entitlements protected by a liability rule can be transferred if one of the parties consents to the transfer (even if the other party objects). Calabresi & Meamed, *supra* note 29, at 1092–93.

353. Carol Rose, *The Shadow of the Cathedral*, 106 *YALE L.J.* 2175, 2177 (1997).

354. Calabresi & Melamed, *supra* note 29, at 1115–17.

bifurcated the allocative process, they concluded that three broad types of considerations are relevant to both decisions: economic efficiency, distributional goals, and “other justice reasons.”<sup>355</sup>

In the typical nuisance case in which a landowner asserts a claim against the undesirable activity of his neighbor, there are four possible *Cathedral* outcomes:

*Rule One* gives the plaintiff an entitlement protected by a property rule, which means granting an injunction against the defendant’s conduct. The defendant may continue to engage in the conduct only if she negotiates (invariably understood to result in some sort of compensation) with the plaintiff to do so.

*Rule Two* gives the plaintiff an entitlement protected by a liability rule, which means the denial of injunctive relief but the allowance of objectively determined damages to compensate for injuries sustained as a result of the defendant’s activities.<sup>356</sup>

*Rule Three* gives the defendant an entitlement protected by a property rule, which means the plaintiff is denied both an injunction and damages. The plaintiff may stop the defendant’s conduct only by negotiating with him (again assumed to mean payment of a price set by the defendant).

*Rule Four* expands the traditional framework memorialized in Rules One, Two, and Three to give the defendant an entitlement protected by a liability rule. In practice, it contemplates the defendant continuing his conduct at will unless the plaintiff “purchases” an injunction, permitting her to extinguish the defendant’s entitlement for an objectively determined price.<sup>357</sup>

### B. Gang Injunctions from the Cathedral

In developing gang injunctions, California authorities clearly appreciated the compelling connection between the interaction among gangs and host communities and nuisance principles. However, firmly ensconced within the criminal framework, they were unable to appreciate that connection as more than a creative end-run around the limitations of criminal law. From that orientation, gang activity

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355. *Id.* at 1093.

356. The most famous Rule Two variant is exemplified in the classic nuisance case *Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870 (N.Y. 1970).

357. Even under its original formulation, the *Cathedral* framework implies two inalienability rules. Under one, the plaintiff would be granted an entitlement that she is never permitted to sell (e.g., the parties may not negotiate around the injunction) and under the other, the defendant would be given an entitlement that he could not sell (e.g., the defendant would have to continue to engage in the challenged conduct). See Calabresi & Melamed, *supra* note 29, at 1111–12.

uncomplicatedly and necessarily provokes a Rule One response. Since gangs are seen to have no legitimate property interests, it is the only reasonable choice.<sup>358</sup> However, once certain gang activity is contextualized as expressing cognizable property interests, the actual conflict must be understood as a paradigmatic nuisance conflict. Local government property interests—ostensibly a proxy for the interests of the “community” to enjoy its property free of “disreputable or obstreperous or unpredictable people”<sup>359</sup> and their activities<sup>360</sup>—conflict with the gang’s interest in developing and using its identity property. In resolving *that* conflict, the *Cathedral* framework offers a full range of potentially desirable outcomes, as charted in the matrix below.<sup>361</sup>

	<i>Entitlement granted to</i>	
	Community	Gang
Property Rule	Gang Injunction (Rule One)	Negotiation (Rule Three)
Liability Rule	Damages (Rule Two)	Purchased Injunction (Rule Four)

Selection among these now available options may be guided by the constellation of normative considerations for which Calabresi and Melamed advocated. After outlining the main features of that constellation, the discussion that follows briefly engages it to (A) suggest that economic, distributional, and other justice considerations fail to support a Rule One approach (i.e., gang

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358. Calabresi and Melamed provide both structural and economic justifications for this conclusion. *Cathedral* includes an entire discussion of its application in the context of crimes against property and bodily integrity. In these cases, Calabresi and Melamed conclude, entitlements must be protected by property rules to maintain the integrity of property rules. *Id.* at 1125–26 (“The thief not only harms the victim, he undermines rules and distinctions of significance beyond the specific case.”). Moreover, the context suggests that the approximation of value that liability rules constitute is not an indication of how the parties value the underlying good. *Id.* at 1125.

359. Wilson & Kelling, *supra* note 174, at 30.

360. As noted above, interrogation of the actual or imputed perception of gangs is beyond the scope of the present discussion.

361. This chart is an application to gang injunctions of the Taney/Marshall nuisance example presented in the *Cathedral*, Calabresi & Melamed, *supra* note 29, at 1115–18, which was drawn from Frank I. Michelman, *Pollution as a Tort: A Non-Accidental Perspective on Calabresi’s Costs*, 80 *YALE L.J.* 647 (1971).

injunctions) and (B) conclude that those considerations favor a Rule Four approach as a desirable resolution to the gang property conflict.

### 1. NORMATIVE CONCERNS IN THE *CATHEDRAL*

Working within the law and economics tradition, the first and most elaborated consideration Calabresi and Melamed set out was “economic efficiency,” then the normative object of the field. Their formulation pragmatically pursued the Kaldor-Hicks criterion:

Economic efficiency asks that we choose the set of entitlements which would lead to that allocation of resources which could not be improved in the sense that a further change would not so improve the condition of those who gained by it that they could compensate those who lost from it and still be better off than before.<sup>362</sup>

As a practical matter, they considered various potential uncertainties to conclude that, in the face of those uncertainties, “costs should be put on the party or activity which can with the lowest transaction costs act in the market to correct an error in entitlements by inducing the parties who can avoid social costs most cheaply to do so . . . .”<sup>363</sup>

Law and economics scholarship has migrated—impelled by powerful internal and external critiques—among competing definitions of efficiency. The utilitarian efficiency at the center of the *Cathedral* giving way as the field’s leitmotif to, for example, Richard Posner’s wealth maximization theory,<sup>364</sup> and to “welfare,” promoted by Louis Kaplow and Steven Shavell.<sup>365</sup> These developments suggest that the precise formulation of the *Cathedral*’s normative criterion is less important than the basic efficiency premise that underlies it. The choice among *Cathedral* rules should promote the best outcome given the resources available, “a desire to make everyone better off.”<sup>366</sup>

Though it has garnered significantly less attention,<sup>367</sup> the *Cathedral*’s incorporation of fairness criteria, through distributional

362. Calabresi & Melamed, *supra* note 29, at 1093–94.

363. *Id.* at 1097.

364. See generally RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* (1981).

365. See generally LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* (2002).

366. Calabresi & Melamed, *supra* note 29, at 1104.

367. Except notably from Bell & Parchomovsky, *supra* note 346, at 12 (addressing the full spectrum of concerns raised by the *Cathedral* in their extension and modification of the analysis).

goals and “other justice reasons,” gives finer moral resolution to the nebulous concept of “better off.”<sup>368</sup> Distributional concerns contemplate incorporating into the analysis distributional justice and corrective justice ideals to ask which *Cathedral* rule will promote the general wealth distribution that society favors and which will ensure that individuals have a “minimum endowment of certain particular goods.”<sup>369</sup> Although Calabresi and Melamed “admit that it is hard to know what content can be poured into th[e] term,”<sup>370</sup> the final category of pertinent considerations, “other justice reasons,” leaves open the possibility that fairness might beg the assignment of an entitlement or the choice of a particular protective rule for reasons that cannot be comprehended in terms of efficiency or distribution.<sup>371</sup>

## 2. THE CASE AGAINST GANG INJUNCTIONS

Under any rubric of economic efficiency, gang injunctions present an uncertain calculus. However, considering only the greater marginal social exclusion of gang members in relation to the members of host communities, they almost invariably face higher transaction costs. Thus, it is likely that the community, especially when represented—as is almost always the case—by a municipality, is the “cheapest cost avoider.”<sup>372</sup> Under the *Cathedral* framework, this asymmetry would indicate that the economically superior rule is not Rule One, the gang injunction, but Rule Three, pure negotiation (e.g., no injunction).

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368. Most economic scholarship purports to maintain moral neutrality, see Michael A. Heller, *The Boundaries of Private Property*, 108 YALE L.J. 1163, 1165 n.4 (1999) (recognizing justificatory considerations “lurk” in all property law analysis, but “fall outside [his] explicit focus”), which is a chief critique of the field. See, e.g., Ronald M. Dworkin, *Is Wealth a Value?*, 9 J. L. STUD. 191, 194–96 (1980). Some law and economics proponents (like Posner), in contrast, claim that efficiency is itself a moral rubric. However, that view is not widely held. Nonetheless, the *Cathedral*’s incorporation of this element of moral flexibility has served as one avenue by which it has been challenged (the nonmarket considerations potentially impact the evaluation of efficiency proper), but that flexibility makes the *Cathedral* a particularly suitable model for the interdisciplinary, multi-interest, and politically and theoretically feasible approach to resolving the gang injunction debate being advanced here.

369. Calabresi & Melamed, *supra* note 29, at 1100.

370. *Id.* at 1102.

371. *Id.*

372. Guido Calabresi, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 262, (1970). Under Calabresi’s formulation, the cheapest cost avoider is in the best position to make the cost-benefit analysis between the cost of unwanted outcomes and the cost of avoiding those outcomes. In the *Cathedral* framework, liability—thus, no entitlement—should rest with the cheapest cost avoider on the assumption that that party is in the best position to evaluate how to stop gang behavior.

A more reliable factor that dissuades the use of gang injunctions under the *Cathedral* framework draws on a different principle of law and economics that is implicit in the *Cathedral*:<sup>373</sup> that among the chief purposes of law is to minimize social costs (i.e., externalities) by promoting their internalization.<sup>374</sup> Deterring the activities that create externalities, then, also enhances efficiency. In the economic analysis of law, that argument is the implicit foundation of an injunction. It is, however, axiomatic that such deterrence requires efficacy. Thus, a key inquiry into the efficiency of gang injunction must be whether it is effective. To that end, whether the mechanism is capable of reducing the unwanted activity targeted by the mechanisms is the key metric of gang injunction efficacy. Unarguably, gang injunctions primarily pursue this goal by deterring noncompliant behavior through the threat of sanction. So, the efficiency analysis turns on whether they are capable of meaningfully incentivizing desired behaviors. The present discussion cannot accommodate any meaningful summary, analysis, or critique of the rich body of deterrence literature that is available across several substantive legal fields. However, it is possible to distill the accepted principles of deterrence with which that literature engages.

Embedded in the idea of deterrence is rationality manifest in an actor's analysis weighing the cost of the conduct against its expected benefits.<sup>375</sup> In order for a legal mechanism to have a deterrent effect on an actor's conduct, it must impact that cost-benefit analysis. It is well-established that such impacts rise above a *de minimus* level only where three related enforcement conditions combine multiplicatively to raise the cost of an activity: magnitude,<sup>376</sup> probability,<sup>377</sup> and delay.<sup>378</sup>

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373. This idea is at the core of Calabresi's earlier work on the cost of accidents.

374. The idea of forcing parties to "internalize the externalities" of their activities is discussed in several of the seminal articles on property and externalities. See, e.g., Demsetz, *supra* note 290, at 348 ("A primary function of property rights is that of guiding incentives to achieve a greater internalization of externalities."); Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 684 (1973) ("Welfare economists have urged that harmful externalities be 'internalized' to eliminate excessive amounts of nuisance activity. Internalization is said to be accomplished through devices that force a nuisance-maker to bear the true costs of his activity."); see also Jedediah Purdy, *The Politics of Nature: Climate Change, Environmental Law, and Democracy*, 119 YALE L.J. 1122, 1132 (2010) ("The standard solution to negative externalities . . . is to change the incentives of individual choices by legally internalizing some of the costs of the harms.").

375. See, e.g., Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 176-77 (1968).

376. Research has consistently shown that consequences without sufficient and accurate "punitive 'bite'" produce little or no suppression of unwanted behavior. Paul H. Robinson & John M. Darley, *Does Criminal Law Deter? A Behavioral Science*

Gang injunctions fail to adequately or fully exhibit any of these conditions.

Imposed on individuals who have, generally, had intimate direct or indirect penal interactions with the criminal justice system, both the civil and criminal consequences of violating a gang injunction are relatively mild. Moreover, evidence suggests that such formal negative consequences may not be perceived as such within the gang's normative space. The informal consequences of gang injunctions (i.e., the empowerment of police officers to stop and interrogate injunctees and putative injunctees) may be properly calibrated.<sup>379</sup> However, those consequences are inadequately pegged to the imposition of the injunction, so they are rarely counted as consequences of the injunction that will be incorporated into an individual's perceived costs.

Limitations on resources, enforcement philosophies and strategies, and police discretion make gang injunction enforcement necessarily inconsistent (i.e., the probability of apprehension is low).<sup>380</sup> Moreover, the enforcement rate required for efficacy contradicts the goals and uses of the mechanism by police.<sup>381</sup> These factors precipitously decrease the deterrent power of gang injunctions by lowering their perceived cost.<sup>382</sup>

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*Investigation*, 24 OXFORD J. LEGAL STUD. 173, 185–86 (2004). The corollary of this idea is that there must be a clear, *a priori* statement of the consequence, the circumstances in which the consequence will be imposed, and the reason the behavior is subject to consequences. *Id.* at 175. Without such information, the stimulus cannot cause avoidance of unwanted behavior, and no suppression will occur. *Id.* at 176 n.3.

377. No matter how severe the punishment, if it is inconsistently administered, it will be ineffective on a macro level. At ten percent almost no suppression occurs. *Id.* at 183.

378. The timing of the consequence is also a critical factor for its effectiveness. Delayed punishment precipitously decreases avoidance behavior by causing the individual to weigh the possibility of the imposition of some stimuli in the future with the immediate gratification resulting from engaging in the unwanted behavior. This problem is particularly pronounced where the individual has immature capacities for either consequential reasoning (i.e., he has not fully developed the ability to internalize the long-term consequences of his behavior) or impulse control (i.e., he has not fully developed the ability to refrain from acting according to immediate desires).

379. It has been argued that it is a total loss of freedom akin to civil death, and injunctees have expressed similar sentiments.

380. Even if there were a one-to-one ratio of enjoined individuals to police officers available for enforcement, it would be both unreasonable and infeasible to implement the level of surveillance necessary to enforce the terms of gang injunctions upon every violation.

381. For example, where a serious crime could be prevented or solved by ignoring an injunction violation, police will ignore the injunction violation. O'DEANE, *supra* note 20, at 322.

382. The net cost of a prohibited activity is a function of the probability of enforcement. For example, if the civil penalty for violating a gang injunction is \$1,000 (assuming no other costs) but there is only a perceived 10% probability of being caught, then the net cost of the violation is  $\$1,000 \times 0.1$ , or \$100.

The same resource limitations described above and, more importantly, constitutional due process protections make immediate imposition of consequences impossible. In general, people place less weight on events in the future than on events in the present, a tendency that is particularly severe with youth in the typical gang injunction age range of fourteen to twenty years old.<sup>383</sup>

Deterrent factors almost completely undermine the potential efficacy of gang injunctions, and distributional considerations dissuade their utilization. The task of identifying a coherent scheme of wealth distribution preferences observable within any jurisdiction is beyond the scope of this discussion, but at least two such preferences seem generally acceptable from diverse perspectives on U.S. law. First, a fundamental American value seems to be that the initial distribution of wealth should be generally equal. Second, adjustments from that initial distribution should be merit- or desert-based. Notwithstanding the rhetoric of responsibility, gang injunctions tend to undermine those preferences.

For example, they exacerbate the disproportionate concentration of the cost of law-and-order policies in subaltern communities<sup>384</sup> by supporting, reinforcing, and often constituting policies generating extremely large carceral and supervisory populations within communities that typically play host to gangs. Such high levels of incarceration and supervision, and the accompanying community surveillance, are generally recognized as having costly repercussions, including high un- and under-employment rates and depressed economic status not only for the direct objects of those policies but also the broader communities in which they live. Notwithstanding her theoretical support for gang injunctions, Meares' creative strategies for addressing this skewed cost distribution in other contexts suggests that preferable and more efficient approaches avoid such impacts: "[I]f law enforcement could be re-engineered in certain contexts so that the negative consequences were not visited upon weakly organized communities, there would be obvious benefits."<sup>385</sup>

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383. O'DEANE, *supra* note 20, at 15. Years of research indicate that consequential reasoning and impulse control do not reach maturation until twenty-six years old. Abigail A. Baird & Jonathan A. Fugelsang, *The Emergence of Consequential Thought: Evidence from Neuroscience*, 359 PHIL. TRANSACTIONS ROYAL SOC'Y B: BIOLOGICAL SCI. 1797, 1800 (2004) ("By late adolescence, many individuals are able to reason in ways that resemble those of adults; however, it is clear that the emergence of this ability depends in great part on experience, and therefore does not appear across all situational domains simultaneously.").

384. See Tracey L. Meares, *Place and Crime*, 73 CHI.-KENT L. REV. 669, 695-96 (1998); Meares, *supra* note 139, at 205-06 (1998).

385. Meares, *Place and Crime*, *supra* note 384, at 696.

Finally, justice considerations disfavor gang injunctions. Gang members are already marginalized into and through their illicit activities. Through gang injunctions, at least some portion of their otherwise legitimate behavior is also de-legitimized. They are deprived by the injunction of meaningful ownership of their previously legally legitimate identity personal property; they are severely restricted in their ownership interest of identity real property; and they are pushed to and over the metaphorical and literal boundaries of the community. Where the result is not *du jure* geographic banishment,<sup>386</sup> there is psychological banishment.<sup>387</sup> Virtually every act is not merely suspect but presumptively illegitimate, which disqualifies the gang member from community membership. Such banishment serves to fortify the barriers to legitimized forms of identity property, which leads to strengthened ties to and reliance on the alternative identity property production opportunities presented by gangs.

If the broader goal of gang injunctions is to eliminate the negative consequences of gangs from host communities, the preceding analysis dictates selection of a different *Cathedral* rule, if possible.

### 3. THE CASE FOR GANG COMPENSATION

As discussed above, an intuitive efficiency analysis suggests that, because of high transactions costs, Rule Three is the best *Cathedral* option in the gang property context. Elaborated slightly, from the property perspective on gang activity offered here, an entitlement to the gang protected by a property rule may promote efficiency because the community arguably is better positioned to balance the harm of the disfavored gang activity with the cost of its avoidance. According to the best available information, such avoidance requires gang members to have access to mainstream sources of capital that are initially inaccessible to them for complex reasons. This inaccessibility is perpetuated and fortified by the direct and collateral consequences of gang membership. Once closed, whether and how to open avenues for mainstream capital acquisition are largely within the control of formal and informal community institutions.

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386. Howarth, *supra* note 108, at 735 (“The removal of gang members from their own neighborhood streets represents a literal example of this metaphorical sanitization of the public realm.” (quoting Boga, *supra* note 112, at 493)). For a general discussion of the ways injunctions are a modern functional equivalent to banishment, see Smith, *supra* note 119, at 1464–66.

387. Howarth, *supra* note 108, at 739 (“The injunction is a symbolic message of removal from the community. As a method of accountability, it is ineffective because the sanctions are more like harassment.”).

Rule Three (negotiation) also has positive redistributive and corrective justice potential. Negotiation proactively diffuses the concentration of the costs of law-and-order political strategies in the subaltern communities with which Meares is concerned. Accepted research suggests that gang members pursue the closest approximation of dominant values perceived to be reasonably available to them.<sup>388</sup> To that end, among the main drivers of criminal behavior of gangs is lack of access to economic capital, which stymies the pursuit of other mainstream capital. Accordingly, negotiation for the cessation of non-criminal activities that results in the acquisition of sufficient economic capital should lead to reductions in criminal behavior and the costs associated therewith. Such crime reduction can be cyclically reinforcing because, absent an independent or discriminatory basis to maintain heightened surveillance on communities, it frees police resources to be reallocated out of communities that played host to gangs.

Other justice considerations also support Rule Three in the gang context. By engaging gang members in an agreement about the value of their identity property and using the compensation negotiation to create an ongoing positive relationship between communities and gangs that had been defined on the gang's terms, the process becomes community-affirming and humanizing. Instead of delegitimizing everything about the gang member, the community can acknowledge and respect the settlements gangs have made with respect to their property interests and, then, give them a fundamental role in determining how to accommodate or dispose of those interests in light of countervailing community interests.

Strong considerations suggest Rule Three provides an approach to gangs that is not only potentially effective and efficient but responds to the factors that make gang property interests a cognizable concern. However, another important insight from the *Cathedral* belies this limited analysis. In exploring their framework, Calabresi and Melamed suggested that, where transaction costs are high, liability rules are likely to more consistently approximate an efficient market outcome. In the gang context, gangs may face higher transaction costs compared to the host community, as assumed above, but the conflict generally faces high transaction costs. Indeed, the number of potential parties and the difficulties of reducing the identity property interests at stake to a market value will likely defeat any resolution by negotiation, even where that outcome would benefit all. In such cases, Calabresi and Melamed prefer liability rules.

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388. Hagedorn, *Gangs in Late Modernity*, *supra* note 48, at 295–301.

Accepting the proposition that transaction costs would likely stymie negotiations in the gang context, the remaining viable *Cathedral* options are Rule Two, a liability rule protecting the community as entitlement holder, and Rule Four, a liability rule in favor of the gang. The Rule Two damages analysis under the *Cathedral* framework echoes the theoretical analysis dissuading gang injunctions offered above. Appreciating the function and value of gang identity property interests, it is clear that the gang is not the cheapest cost avoider. As a deterrent mechanism, damages are no more likely to be effectual than the civil and criminal liability associated with an injunction. And, as a practical matter, gang members are likely to be actually or effectively judgment proof. That fact alone undermines any claim to efficiency or ameliorative wealth distributional effects. Rule Two also expresses the same message of presumptive illegitimacy and community exclusion as an injunction, albeit in weaker terms.

In contrast, a Rule Four compensated injunction is positively responsive to efficiency, distributional, and justice concerns in much the same way as Rule Three. However, it is not frustrated by obstacles to negotiation. Moreover, Rule Four responds to an additional key justice (or distributional) concern and value of Rules One and Two that was overshadowed by unfavorable efficiency factors in the discussion above: the expressive function and social meaning of law for the host community.<sup>389</sup> Gang injunctions send a powerful and unproductive exorcising message that criminogenically reinforces the marginalization of gangs. In contrast, Rule Four compensated injunctions allow communities to maintain a powerful disapprobatory message with respect to gang conduct, while obligatorily (A) acknowledging gang members' connection to the community, (B) respecting their humanity, and (C) meaningfully opening those avenues for the acquisition of capital that have historically proved to be successful routes out of the deleterious phase of gang involvement.

### *C. Applications, Implications, and Limitations*

The preceding traditional, though not exhaustive, examination of the *Cathedral* framework suggests Rule Four as a positive comprehensive approach to the non-criminal but undesirable behavior

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389. See Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy*, 1990 DUKE L.J. 1, 2-3; Joel Feinberg, *The Expressive Function of Punishment*, 49 MONIST 397, 400-02 (1965); Kahan, *Social Influence*, *supra* note 168, at 349-50; Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 592-94 (1996); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 909-10 (1996); Franklin Zimring & Gordon Hawkins, *The Legal Threat as an Instrument of Social Change*, 27 J. SOC. ISSUES 33, 38-40 (1971).

gangs introduce into the communities situated in their territories. Practical considerations support this preliminary conclusion, as well. To understand this claim it serves to elaborate briefly how Rule Four might manifest itself in the gang context.

The one reported case that employed a compensated injunction<sup>390</sup> and each of the three subsequent elaborations thereof<sup>391</sup> contemplate the compensation element of the compensated injunction would take the form of monetary relief. However, there is nothing in the orthodox or teleological scope of the principle or in the plain meaning of the word “compensate” to require this narrow vision. Indeed, Calabresi and Melamed suggested broad flexibility in the employment of the *Cathedral* rules that would not invariably link liability rules to monetary relief.<sup>392</sup> In the gang context, this flexibility creates the potential that a Rule Four approach to gang conduct is not only more responsive to economic, criminological, and justice concerns but also pragmatic<sup>393</sup> and politically feasible.

Substantively limited to behavior not otherwise criminalized in existing law, the “compensated gang injunction” would be imposed according to the same procedures and standards that have been used to impose existing gang injunctions. That is, the city would file a nuisance abatement action seeking an injunction against a named gang that specified the behavior that was alleged to have created a nuisance.<sup>394</sup> However, the court would also mediate negotiation for compensation to be made to the enjoined gang members.<sup>395</sup> In lieu of monetary compensation for refraining from gang activity, however, enjoined gang members would be offered pathways into the mainstream capital

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390. See *Spur Indus., Inc. v. Del E. Webb Dev. Co.*, 494 P.2d 700 (Ariz. 1972) (en banc).

391. See Ellickson, *supra* note 374, at 744–47; Jeff L. Lewin, *Compensated Injunctions and the Evolution of Nuisance Law*, 71 IOWA L. REV. 775 (1986); Edward Rabin, *Nuisance Law: Rethinking Fundamental Assumptions*, 63 VA. L. REV. 1299, 1311 (1977).

392. Calabresi & Melamed, *supra* note 29, at 1122 n.62.

393. The suggestions here are pragmatic because they recognize that sometimes unwanted behavior can become so entrenched that manipulating social norms can be as powerful as changing the law. Jeffrey J. Rachlinski, *The Limits of Social Norms*, 74 CHI.-KENT L. REV. 1537, 1537 (2000) (“[G]aining control over dysfunctional societies might depend more upon using or manipulating social norms than upon enforcing the law.”). As Calabresi and Melamed suggest, the compensated injunction can be a policy choice. See Calabresi & Melamed, *supra* note 29, at 1105–06. The model offered below for the compensated gang injunction aims to create avenues for changing capital availability to destabilize the structure of the unwanted social norms.

394. Consistent with the arguments offered here, the behavior would be limited to otherwise lawful conduct. Already criminalized conduct would continue to be enforced through existing criminal laws.

395. This is essentially what occurred in *Spur*, 494 P.2d at 708.

and property system from which they are marginalized. The key features of such a “service” model of compensation have already been implemented successfully in the work of various non-profit organizations. In exchange for a commitment to remain uninvolved in gang activity, these organizations’ constituents gain access to a menu of capital-producing services, including job training, education, employment or employment counseling, mental health services, life counseling, tattoo removal, and legal services.

The results achieved by Homeboy Industries<sup>396</sup> provide practical support for the theoretical arguments offered here that a compensated gang injunction would be economically, criminologically, and equitably superior to a gang injunction. The organization, which is the nation’s largest gang intervention and reintegration program, targets former gang members with the most barriers to mainstream employment, including extensive and visible tattoos, mental health impediments, and significant or recent felony records. Upon acceptance to the program, the individual is assigned a case manager with whom he develops a service plan that reflects the gang member’s objectives and the services in which he will participate to accomplish them. Depending on the incoming skill level of the individual, he may receive a remunerated job-training position in one of Homeboy Industries’ economic enterprises (e.g., commercial food preparation and management, pastry baking, restaurant management, gardening, silkscreen printing, and solar panel installation) with employers willing to hire Homeboy Industries’ difficult-to-employ population. During their participation in the program, which is targeted to last approximately eighteen months, participants also receive free social services, including tattoo removal, parenting classes, high school equivalency preparation, substance abuse counseling, clinical and group mental health programming, language and life coaching, and legal assistance.

Homeboy Industries reports that more than two-thirds “of trainees who complete the 18-month Homeboy program have stayed out of prison and have found gainful employment.”<sup>397</sup> Although Homeboy Industries works with a voluntary population, this statistic creates a reasonable inference that at least a comparable portion of involuntary participants in such training programs would become disassociated with gangs for several reasons. First, existing evidence indicates that

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396. For information about the organization *see* HOMEBOY INDUSTRIES, [www.homeboyindustries.org](http://www.homeboyindustries.org) (last visited Oct. 9, 2015).

397. HOMEBOY INDUSTRIES, 2013 ANNUAL REPORT 6 (2014), <http://www.homeboyindustries.org/frequently-asked-questions/annual-report-hb/>; *see also* Jorja Leap et al., *Nothing Stops a Bullet Like a Job: Homeboy Industries Gang Prevention and Intervention in Los Angeles*, in BEYOND SUPPRESSION: GLOBAL PERSPECTIVES ON YOUTH VIOLENCE 127 (Joan Serra Hoffman et al. eds., 2011).

full-time, legitimate employment at any income level is associated with decreases in and cessation of active gang involvement. Individuals may continue to identify with a gang, but they reduce or stop their engagement in criminal, tortfeasance, and otherwise objectionable gang conduct that is the overarching concern of host communities. That evidence is supported by anecdotal reports that gang members profess a desire and willingness to refrain from entrepreneurial gang activity when comparable legitimate economic activities are available. Since economic analyses of gang finances indicate that the average gang member can earn no more than \$20,000 annually from gang-associated economic activities,<sup>398</sup> licit employment at this approximate income level is expected to result in the termination of the types of gang conduct with which gang injunctions are concerned, as well as the associated criminal conduct. Under Meares' social organization theory and Kahan's social influence approach, the reduction in individual gang behavior on a wide scale should also have broad community impacts that reinforce the positive impact of the compensated gang injunction.<sup>399</sup> Caldwell's multiple-marginality legal analysis implies the same conclusion.<sup>400</sup>

The criminological efficacy of the Homeboy Industries "jobs not jails" approach is complemented by evidence of its financial results. Through its financial enterprises, employing more than four hundred former gang members, the organization, which does not aim to be economically self-sustaining, generated more than \$4 million in business revenue and \$1.5 million in revenue from government contracts in 2013, amounting to nearly one-half of its total operating expenses.<sup>401</sup> The implication of these financial results is that compensated injunctions are not only potentially superior in terms of economic efficiency but for pragmatic economic reasons, as well. To date, no studies have been undertaken to evaluate the costs of gang injunction enforcement.<sup>402</sup> This lack of data renders impossible the development of methodologically sound comparisons and predictors of the financial implications of the paid injunction. However, even without such empirical analysis, it is clear that a program that both contributes significantly (or wholly) to its own financial support and reduces the

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398. Levitt & Venkatesh, *supra* note 23, at 756.

399. See *supra* notes 164–72 and accompanying text.

400. See Caldwell, *supra* note 178.

401. HOMEBOY INDUSTRIES, *supra* note 397, at 25.

402. The cost to the city of Oakland of acquiring gang injunctions has been reported. *Public Safety Committee Report Reveals Cost of Oakland Gang Injunctions—But Is It Worth It?*, SFGATE (Feb. 16, 2011, 2:16 PM), <http://blog.sfgate.com/inoakland/2011/02/16/public-safety-committee-report-reveals-cost-of-oakland-gang-injunctions-but-is-it-worth-it/>.

number of individuals prosecuted and imprisoned can present significant and sustainable savings.

Available information on incarceration generally supports this inference. As discussed above, gang injunctions contribute to gang member incarceration directly, by effectively criminalizing otherwise legal conduct and heightening surveillance on the host community population, and indirectly, by reinforcing criminogenic capital marginalization. The base cost to keep one adult incarcerated in Los Angeles County ranges from \$45,000 to \$65,000 annually.<sup>403</sup> And the base cost to keep one juvenile detained ranges from \$100,000 to \$150,000 annually.<sup>404</sup> In contrast, Homeboy Industries' program costs between \$20,000 and \$45,000 per participant, saving (according to its founder, Father Greg Boyle) Los Angeles County and the State of California \$20 million per year.<sup>405</sup>

Finally, the success of Homeboy Industries supports both the identity property-affirming conception of gangs advanced here, as well as the *Cathedral*-based distributive and justice concerns framed above. Rather than further marginalizing gang members from mainstream markets, Homeboy Industries attempts to fill the same economic, social, and cultural capital gaps that generate gangs and create a bridge to mainstream networks and identity property access for its service population. That successful participants exploit such access to mainstream capital to pursue traditional avenues of identity property engagement buttresses Peñalver's and Katyal's claim in *Property Outlaws* that the acquisition of property through the means available to an individual, even if illegal, is not necessarily a moral failing of the individual property transgressor.<sup>406</sup> Instead, it is endemic to free market societies and is part of the natural inclination to pursue identity property.

Both theoretical and practical evaluations indicate that a compensated gang injunction is a feasible and desirable alternative to the gang injunction model of gang *intervention* and *re-integration*. However, it would be inappropriate to conclude that the strategy can or should constitute a comprehensive approach to gangs. In the immediate term, the compensated injunction does nothing to forestall the capital

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403 This estimate excludes the cost of police enforcement, prosecution, and ancillary services to the carceral population, as well as opportunity costs.

404. See *Frequently Asked Questions*, HOMEBOY INDUSTRIES, <http://www.homeboyindustries.org/what-we-do/faq/> (last visited Oct. 24, 2015).

405. Megan Driscoll, *Saving Young Lives: Study.com Speaks with the Founder of Homeboy Industries*, STUDY.COM (Mar. 4, 2011), [http://study.com/articles/Saving\\_Young\\_Lives\\_Education\\_Portal\\_Speaks\\_with\\_the\\_Founder\\_of\\_Homeboy\\_Industries.html](http://study.com/articles/Saving_Young_Lives_Education_Portal_Speaks_with_the_Founder_of_Homeboy_Industries.html).

406. Peñalver & Katyal, *supra* note 28, at 1153–54.

deficits that result in gang formation, and it only indirectly confronts gang crime. A comprehensive gang strategy must include (A) education and prevention programming to narrow the channels leading to gang emergence and (B) effective mechanisms for directly suppressing the criminal conduct of gangs.

As the Homeboy Industries example also demonstrates, the viability of the strategy is highly dependent on either adequate and flexible organization financial support or favorable mainstream economic conditions. As the California job market contracts, so do permanent employment opportunities for gang members outside Homeboy Industries' enterprises. In response, the organization is required to raise additional funds from private donors to keep its service population employed. Obviously, responding to such budgetary fluctuations could present a larger obstacle in the compensated gang injunction context, which would rely on government funding or fundraising. However, proper management could minimize the difficulties such fluctuations pose. For example, current gang injunction strategy seeks to enjoin as many individuals as possible. A compensated injunction model would disincentivize this practice and encourage municipalities to selectively deploy intervention strategies in the most cost-effective manner.

The specter of cost management raises a final potential limitation of the proposed compensated gang injunction that will be considered here: free riders. A gang free rider is an individual who would inflate or claim association with a gang in order to trade on the capital the gang has created in its alternative market or, in the context of the proposal proffered above, obtain the advantages promised by the compensated gang injunction. Although the term is not used here in its typical connotation in economic literature, the analogy is apt because it results in the same negative effect—"overconsumption" of gang activity. Gang free riding is an existing problem potentially exacerbated by a compensated injunction. However, its scope is containable if the compensated gang injunction is implemented only where adequate prevention and suppression efforts are in place. Moreover, there are several reasons to question the magnitude of the issue. Empirical economic research has contradicted the traditional "strong" free rider hypothesis.<sup>407</sup> People rarely consume non-excludable resources without contributing. Free riding does exist, but at a weak level. That is, people do contribute substantially but less than they would for an excludable

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407. See, e.g., Gerald Marwell & Ruth E. Ames, *Economists Free Ride, Does Anyone Else? Experiments on the Provision of Public Goods*, IV, 15 J. PUB. ECON. 295 (1981).

resource.<sup>408</sup> This evidence correlates to criminological evidence indicating that unquantifiable endogenous factors constrain which “at risk” individuals actually join or associate with gangs.<sup>409</sup> Furthermore, contributions of social norm theory to economics have suggested that social norms and institutions can be mobilized to limit free riding.<sup>410</sup> That insight is equally applicable in the gang context, where the value of gang identity property is affected by its exclusiveness and full capitalization on gang identity property requires increasing marginalization from mainstream avenues of capital accumulation.

#### CONCLUSION, OR, CAPITALIZING ON CAPITALISM IN STREET GANGS

Gangs occupy a uniquely vilified position in the American popular consciousness. Notwithstanding the availability of a rich body of sociological, criminological, and legal literature concerned with issues at the center and in the penumbra of the phenomena, often ostensibly aimed at harnessing intellectual and emotional sympathy, members of street gangs remain an almost universally disdained population. Such aversion has impelled a criminological approach to gangs that ignores their fundamental role as corporatized institutions of capital and property generation for their marginalized members. The core of a gang’s pursuits is not criminal activity but the engagement with identity property—those forms of property connected to and necessary for vocational humanity.

Understanding this property epicenter of gangs permits policy makers to explore a wider range of policy responses to the manifestation of gangs in a community. Though it incorporates nonmarket considerations, the market-inspired policy approach utilized here indicates that a compensated injunction is likely an economically efficient response to non-criminal gang activity unwanted by the communities in which gangs are situated. That analysis also shows the response is both criminologically effective and just.

The implications of this analysis are broad. Property law stands uniquely amongst other laws as fiercely tied to the values of stability, immobility, and stasis. The field of law and economics is often criticized for exhibiting this same feature. The synthesis of property theory and law-and-economics sensibilities offered here proves that the

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408. *Id.* at 307–08.

409. To date, no study has considered whether gang identity can be considered an excludable or non-excludable resource. That inquiry is beyond the scope of the present discussion, but there is ample evidence that supports either conclusion.

410. Elinor Ostrom, *Collective Action and the Evolution of Social Norms*, 14 J. ECON. PERSP. 137, 138, 141 (2000).

idea of property has broad capacity to foster change without undermining its traditional values.