

2013

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Recommended Citation

Baker, Megan K. (2013) "Removing the Presumption of Innocence: A Constitutional Analysis of the Ogden Trece Gang Injunction," *Utah OnLaw: The Utah Law Review Online Supplement*: Vol. 2013 , Article 22.
Available at: <https://dc.law.utah.edu/onlaw/vol2013/iss1/22>

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REMOVING THE PRESUMPTION OF INNOCENCE: A CONSTITUTIONAL ANALYSIS OF THE OGDEN TRECE GANG INJUNCTION

Megan K. Baker*

Abstract

Gang activity poses a substantial problem in many communities. The city of Ogden, Utah, is home to many gangs, and law enforcement is constantly looking for a way to decrease gang violence. In an attempt to reduce gang violence in Ogden, Judge Ernie Jones issued the Ogden Trece gang injunction on September 27, 2010, in Weber County, Utah. The injunction, based on several similar injunctions in California, affects hundreds of alleged Ogden Trece gang members and spans an area including virtually the entire city of Ogden. The injunction prohibits those enjoined from engaging in various illegal activities as well as many otherwise legal activities.

This Note analyzes the unconstitutionality of the Ogden Trece gang injunction, specifically focusing on three main theories. First, the injunction removes the due process rights of those enjoined. Second, the injunction limits the rights to assemble and associate with family members. Finally, the injunction is overly vague and open to excessive interpretation.

I. INTRODUCTION

Drive-by shootings, murders, graffiti, and narcotics trafficking are all issues that surround gang-ridden areas. Wearing the wrong color in the wrong neighborhood, “disrespecting” a gang member, or even talking to the wrong person can all trigger retaliation from a gang and its members. In the 1980s, law enforcement tested a new approach to controlling the seemingly unstoppable gang violence: civil gang injunctions.¹ These injunctions were unprecedented; courts labeled gangs as public nuisances and served injunctions upon their members.² Many of these injunctions have taken place in California where there are an estimated 236,200 gang members, almost one-third the national total.³ Utah

* © 2013 Megan K. Baker, J.D. candidate, 2014, University of Utah, S.J. Quinney College of Law. Special thanks to my husband Brandon and my beautiful bonus daughter Marley for their unending support.

¹ See Malia Wollan, *Gang Injunction Names Names, and Suit Follows*, N.Y. TIMES (May 15, 2010), http://www.nytimes.com/2010/05/16/us/16sfgangs.html?page-wanted=all&_r=0.

² See *id.*

³ See *id.*

recently employed this tactic by enjoining the Ogden Trece gang, which contains approximately 300–500 members.⁴

On September 27, 2010, the Second District Court in Ogden, Utah, issued a preliminary injunction against the Ogden Trece gang. The injunction prohibits various activities including the association of alleged members in “public,” which includes almost the entire city of Ogden.⁵ On August 20, 2012, Judge Ernie Jones made the injunction permanent.⁶ The court enjoined approximately 300–500 alleged gang members.⁷ Within six months, authorities made twenty-four arrests for violating the injunction.⁸

Gang injunctions have been challenged as unconstitutional under a variety of theories, including the theory of undue restriction of the right of association.⁹ However, courts have been reluctant to overturn injunctions and have upheld them numerous times.¹⁰ These courts are incorrect in their analysis and their conclusions. The unconstitutionality of the injunctions can be established on any number of points. Using the Ogden Trece injunction as an example, this Note focuses on three main theories. First, the Ogden Trece injunction violates the due process rights of the enjoined.¹¹ Second, even if a member is properly enjoined, they still have the right to noncriminal assembly and association with their family.¹² Third, the injunction is void for vagueness.¹³

II. BACKGROUND

A. History of Gang Injunctions

A gang injunction is a civil injunction against a group of persons classified as part of a particular street gang.¹⁴ Prosecutors in California pioneered gang injunctions in the 1980s as a tactic used to assist law enforcement in cutting down

⁴ See Pat Reavy, *Ogden Trece Gang Gets Permanent Injunction on Activities*, KSL.COM (Aug. 20, 2012, 10:53 PM), <http://www.ksl.com/?nid=148&sid=21789421>.

⁵ See *Weber Cnty. v. Ogden Trece*, No. 100906446, slip op. at 1, 2 (Utah Dist. Ct. Aug. 20, 2012), available at <http://media.bonnint.net/slc/2501/250103/25010376.pdf>.

⁶ *Id.* at 1.

⁷ Reavy, *supra* note 4.

⁸ See Melinda Rogers, *Ogden Gang Injunction Nets 24 Arrest Cases for Violators*, SALT LAKE TRIB. (Mar. 27, 2011, 1:01 AM), <http://www.sltrib.com/sltrib/home/51453123-76/gang-injunction-police-arrested.html.csp>.

⁹ See, e.g., *People ex. rel. Reisig v. Acuna*, 106 Cal. Rptr. 3d 560, 578 (Cal. Ct. App. 2010).

¹⁰ See, e.g., *id.* at 576–83 (holding that overall gang injunction was constitutional even if certain portions of it were void for vagueness).

¹¹ See U.S. CONST. amend. XIV, § 1.

¹² See U.S. CONST. amend. I.

¹³ See *Chicago v. Morales*, 527 U.S. 41, 56 (1999).

¹⁴ See Wollan, *supra* note 1.

on violent crime and other gang activity.¹⁵ Gang injunctions typically target gangs whose members are primarily black and Latino.¹⁶ A member of the ACLU stated that gang injunctions “function like roving warrants, and they can lead to a lot of racial profiling.”¹⁷

The Los Angeles District Attorney filed the first-ever civil gang injunction in 1987 against a gang known as the Playboy Gangster Crips.¹⁸ While attorneys requested an injunction on both criminal and noncriminal activities,

[t]he judge merely enjoined the Playboy Gangster Crips from committing *illegal* acts that amounted to a nuisance—ordering the gang to desist from trespassing, damaging others’ property, urinating on the street, and littering. The judge denied the prosecutors’ request to prohibit the Playboys from wearing gang clothing, associating with one another, and being out after curfew, finding that these prohibitions were “overbroad in content” and “far, far overreaching.”¹⁹

Subsequent courts largely ignored this limited holding as injunctions continued to issue, and the conduct they prohibited (as well as the geographical areas included) continued to grow.²⁰ In 1997, the California Supreme Court upheld the constitutionality of gang injunctions in *People ex rel. Gallo v. Acuna*.²¹ The court stated that injunctions were an effective way to control gang violence.²² It is

¹⁵ *What is a Gang Injunction?*, ACLU OF NORTHERN CALIFORNIA, https://www.aclunc.org/issues/criminal_justice/what_is_a_gang_injunction.shtml (last visited Sept. 21, 2013).

¹⁶ *Id.* Another issue with gang injunctions is the idea of racial profiling. Many gangs consist primarily of minorities, while membership in some is based on race (e.g., Aryan Nation and Mexican Mafia). See Eric Goldschein & Luke McKenna, *13 American Gangs that Are Keeping the FBI Up at Night*, BUSINESS INSIDER (Jan. 15, 2012, 7:01 AM), <http://www.businessinsider.com/dangerous-american-gangs-fbi-2011-11?op=1> (listing numerous gangs that are based on race including the Mexican Mafia, The Almighty Latin King Nation, The Trinitarios, and MS-13).

¹⁷ Wollan, *supra* note 1.

¹⁸ *Id.*

¹⁹ Alex Ricciardulli, *The Nitty Gritty of Gang Injunctions*, DAILY JOURNAL, <http://www.dailyjournal.com/cle.cfm?show=CLEDisplayArticle&qVersionID=125&eid=645560&evd=1> (last visited Sept. 21, 2013); see also Christopher S. Yoo, *The Constitutionality of Enjoining Criminal Street Gangs as Public Nuisances*, 89 NW. U. L. REV. 212, 217–18 (1994).

²⁰ See Wollan, *supra* note 1; see also *Weber Cnty. v. Ogden Trece*, No. 100906446, slip op. at 2 (Utah Dist. Ct. Aug. 20, 2012), available at <http://media.bonmint.net/slc/2501/250103/25010376.pdf>. (describing the area of restriction to include basically all of Ogden, Utah).

²¹ 929 P.2d 596 (Cal. 1997).

²² *Id.* at 611 (holding that the injunction did not violate the rights of those enjoined due to its limited scope). However, it is important to note that the case in question concerned only a four-block “Safety Zone” in which the gang members were enjoined. *Id.*

important to note that while the California Supreme Court upheld the constitutionality of the gang injunction, the injunction itself was very limited.²³ For instance, the court found that the restriction upon the right to assemble was not unconstitutional due to the limited geographic area in which the injunction was in effect, not the actual legality of suppressing the right.²⁴ The court emphasized that gang members were not using the area to exercise any of their constitutionally protected freedoms, but were only using the area for mischief.²⁵ Furthermore, the court held that the “intimate” or “private” rights to associate (such as the ability to associate with family members) was not an issue, as gang members were not participating, nor trying to participate in, these activities within the Safety Zone.²⁶ Because the injunction restricted rights in such a small geographic area, the court did not find that the infringements on constitutional rights were substantial enough to warrant overturning the civil injunction.²⁷ Today, courts continue to issue gang injunctions; however, they no longer subject themselves to the limits that were originally present in *Acuna*.²⁸ Some current gang injunctions even span entire cities, including the areas in which alleged gang members live and work.²⁹

B. History and Characteristics of the Ogden Trece Gang

Ogden Trece is one of the oldest and largest gangs in Ogden, Utah.³⁰ Known as Ogden Trece and also as the Centro City Locos, the gang includes an estimated 300–500 active members.³¹ Most of the members are Latino, although all races and

at 608. Additionally, the court pointed out that none of the gang members in that case lived in the area in which the injunction applied. *Id.* at 601. In the years following that decision, however, gang injunctions have often begun to span entire cities—including the areas where alleged gang members and their families live and work.

²³ *See id.* at 614–19.

²⁴ *See id.* at 615–16.

²⁵ *Id.* at 608–09.

²⁶ *Id.*

²⁷ *See id.*

²⁸ *See, e.g.,* Weber Cnty. v. Ogden Trece, No. 100906446, slip op. at 1–4 (Utah Dist. Ct. Aug. 20, 2012), available at <http://media.bonnint.net/slc/2501/250103/25010376.pdf>.

²⁹ *See id.* at 2 (describing “Safety Zone” as including the entirety of Ogden, Utah).

³⁰ *See* Tim Gurrister, *Utah Supreme Court Sets Hearing on Ogden’s Trece Injunction*, STANDARD EXAMINER (Apr. 16, 2013, 9:43 AM), <http://www.standard.net/stories/2013/04/16/utah-supreme-court-sets-hearing-ogdens-trece-injunction> (stating that Ogden Trece is the city’s oldest gang); Sandra Yi, *Ogden Gang Problems Going Down 1 Year After Injunction*, DESERET NEWS (Sept. 29, 2011, 8:10 PM), <http://www.deseretnews.com/article/705391702/Ogden-gang-problems-going-down-1-year-after-injunction.html?pg=all> (calling Ogden Trece the city’s largest gang).

³¹ *See* Reavy, *supra* note 4 (noting that the injunction prohibits an estimated 315–500 associated Ogden Trece gang members).

genders are accepted.³² The gang has been linked to violent crimes, including murder, as well as nonviolent crimes such as defacing private property.³³ Members wear distinguishing clothing items, have specific tattoos, and use hand signals to identify their gang affiliation.³⁴ The gang's color is blue, and members often wear Utah Jazz and Dallas Cowboys sports jerseys to show their affiliation.³⁵ They prefer clothing that displays the numbers thirteen or thirty-one.³⁶ They often tattoo an "O" on the top of their head, which they refer to as their "O Crown."³⁷ Other gang tattoos include "CCL," "O13," and "801."³⁸ They refer to themselves as "The Kings of All Sides."³⁹ Members must be "jumped in" and, to achieve full-fledged membership, they must "work for the gang," including doing drug deals, drive-by shootings, and other crimes to increase the gang's notoriety.⁴⁰

C. *The Injunction Against the Ogden Trece Gang*

The Second District Court issued a preliminary injunction against Ogden Trece on September 27, 2010, which is still in effect.⁴¹ The injunction is meant to control gang activity and make Ogden a safer place.⁴² Gang members are enjoined from both criminal and noncriminal activities. The injunction gives a veritable laundry list of prohibited conduct. The court ordered that those subject to the

³² See Nate Carlisle, *Ogden Gang's History Recounted in Injunction Hearing*, SALT LAKE TRIB. (Sept. 14, 2010, 8:16 PM), <http://www.sltrib.com/sltrib/home/50285556-76/gang-ogden-members-powers.html.csp>.

³³ See, e.g., Loretta Park, *Victim in West Point Shooting a Member of Ogden Trece, Say Police*, STANDARD EXAMINER (Sept 17, 2012, 8:26 PM), <http://www.standard.net/stories/2012/09/17/victim-west-point-shooting-member-ogden-trece-say-police>; Emiley Morgan, *Man Who Shot 4, Killed 2 at Ogden Wedding Gets Life Without Parole*, DESERET NEWS (May 28, 2010, 12:00 AM), <http://www.deseretnews.com/article/700035678/Man-who-shot-4-killed-2-at-Ogden-wedding-gets-life-without-parole.html?pg=all> (reporting that two murders committed at a wedding were related to retaliation from members of Ogden Trece).

³⁴ See Carlisle, *supra* note 32.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ See *id.*; see also Jessica Miller, *Ogden Police Stymied by Gang Members Denying Affiliations*, SALT LAKE TRIB. (June 24, 2012, 9:09 PM), <http://www.sltrib.com/sltrib/news/54226037-78/gang-members-injunction-criteria.html.csp>.

³⁹ Carlisle, *supra* note 32.

⁴⁰ Jessica Miller, *Member Details Rules of The Ogden Trece Gang*, SALT LAKE TRIB. (June 12, 2012, 6:29 PM), <http://www.sltrib.com/sltrib/news/54292837-78/gang-injunction-ogden-member.html.csp>.

⁴¹ See Reavy, *supra* note 4 (reporting that the injunction is permanent and still in effect); Jessica Miller, *Ogden Gang Injunction Challenged in Supreme Court*, SALT LAKE TRIB. (June 4, 2013, 1:37 PM), <http://www.sltrib.com/sltrib/news/56409031-78/gang-injunction-court-ogden.html.csp>.

⁴² Carlisle, *supra* note 32 (quoting Judge Jones as emphasizing the "urgency" in moving the case forward).

injunction cannot knowingly associate with any known gang members; intimidate or harass witnesses; possess firearms, imitation firearms, or dangerous weapons in public; create graffiti; possess drugs and drug paraphernalia or be in the presence of a controlled substance held by another person; remain in the presence of open containers of alcohol in public; trespass; break the imposed curfew; or break any other law.⁴³

While some of these prohibitions might seem sensible, their breadth is alarming. For example, to “knowingly associate” includes driving, standing, sitting, walking, gathering, or appearing with any “known” gang members.⁴⁴ While the injunction gives exceptions for attending school or church services, it does not except *traveling* to and from these locations.⁴⁵ Not only may the alleged member not possess a firearm, but he is also prohibited from “remaining in the presence of” anyone possessing a firearm in public.⁴⁶ This could prohibit alleged gang members from remaining in virtually any public place that allows people to carry firearms. The trespass provision provides that no alleged member can remain on any private property without either first obtaining written consent of the owner or having the owner be present and consent.⁴⁷ It is not readily apparent how anyone could comply with such a requirement. The alcohol and drug restrictions are especially concerning due to the wording of the injunction. Since alleged members are prohibited from remaining in the presence of a controlled substance,⁴⁸ an alleged member could conceivably be arrested simply for shopping at a pharmacy or store that contained a pharmacy. While allowing police to arrest alleged gang members shopping at their local pharmacy may not be the intent of the injunction, it nevertheless is permissible. This, to some, will seem absurd and unlikely, but absurd laws lead to absurd results. Finally, a curfew is imposed on all alleged members from eleven o’clock at night to five o’clock in the morning, with the only exceptions being for work, natural disasters, and travel to and from events that charge an admission fee.⁴⁹ Apparently, going to a concert or late-night sporting event is permissible, but traveling to the hospital for a family emergency like child birth or a severe accident would be breaking the law.

Once an alleged member of the gang is served with the injunction, they must comply with its provisions or risk being arrested and charged with violating the order.⁵⁰ Six months after the issuance of the Ogden Trece gang injunction,

⁴³ Weber Cnty. v. Ogden Trece, No. 100906446, slip op. at 2–4 (Utah Dist. Ct. Aug. 20, 2012), available at <http://media.bonnint.net/slc/2501/250103/25010376.pdf>.

⁴⁴ *Id.* at 2.

⁴⁵ *Id.*

⁴⁶ *Id.* at 3.

⁴⁷ *Id.* at 4.

⁴⁸ *See id.* at 3.

⁴⁹ *Id.* at 4.

⁵⁰ Police state that they will not use the injunction to target gang members and that it will only serve as “something more to arrest them for.” Sandra Yi & The Assoc. Press, *Ogden Ban on Street Gang*, KSL.COM (Sept. 28, 2010, 6:20 PM), <http://www.ksl.com/?nid>

authorities had made twenty-four arrests for violating the order.⁵¹ A violation of the order is a Class B misdemeanor,⁵² and can lead to fines and jail time.⁵³ If a person wishes to challenge the injunction, they may file a hardship exemption (allowing exceptions to the association and curfew provisions), or may move to be opted out of the injunction by proving they are not currently, or never were, a gang member.⁵⁴ To date, courts have removed at least two individuals from the injunction by following this process.⁵⁵

The Ogden Police have the task of determining who qualifies as a gang member, and the district attorney simply serves the injunction on anyone the police choose.⁵⁶ Eight criteria are used in determining gang membership.⁵⁷ If a person meets one of the criteria, police can classify him or her as a gang associate.⁵⁸ If someone meets two or more of the criteria, police can classify that person as a gang member.⁵⁹ The criteria given by the Ogden Police for identifying a gang member are as follows:

=148&sid=12610904. Instead, police claim that arrests for violating the injunction are only made when a gang member is pulled over or questioned for another purpose, like a traffic violation. *See id.* However, upon reviewing arrest records for persons who have been charged with violating the order, some were arrested with no other charges listed. *See Lestrick, Shallen Demetrius No. 12-08272: Mugshot*, STANDARD EXAMINER, <http://www.standard.net/jail-mugs/lestrick-shallen-demetrius-12-08272> (last visited Sept. 21, 2013) (showing an arrest record of a member of Ogden Trece arrested for violating the injunction and giving false information to an officer). The charge of giving false information to a police officer likely would not have arisen until after the member was already questioned and possibly arrested for violating the gang injunction. A search of the *Standard Examiner's* website reveals that Lestrick was later arrested on numerous occasions and charged with a violation of the Ogden Trece gang injunction. *See Arrest Report and Mugshots for Shallen Demetrius Lestrick*, STANDARD EXAMINER, <http://www.standard.net> (search "Lestrick, Shallen Demetrius").

⁵¹ *See* Rogers, *supra* note 8.

⁵² *See Lestrick, Shallen Demetrius No. 12-08272*, *supra* note 50.

⁵³ Jessica Miller, *ACLU Will Appeal Ogden Trece Gang Injunction*, SALT LAKE TRIB. (Sept. 12, 2012, 2:19 PM), <http://www.sltrib.com/sltrib/news/54882974-78/injunction-court-utah-appeal.html.csp>.

⁵⁴ *Weber Cnty. v. Ogden Trece*, No. 100906446, slip op. at 5–7 (Utah Dist. Ct. Aug. 20, 2012), *available at* <http://media.bonnint.net/slc/2501/250103/25010376.pdf>.

⁵⁵ Tim Gurrister, *Trece Member Seeks to 'Opt Out'*, STANDARD EXAMINER (Sept. 29, 2012, 10:26 PM), <http://www.standard.net/stories/2012/09/29/trece-member-seeks-opt-out> (stating that another former member of Ogden Trece is attempting to be removed from the injunction).

⁵⁶ Miller, *supra* note 40 (quoting Detective Anthony Powers who states "that sergeants and lieutenants approve police officer's paperwork" detailing persons as gang members).

⁵⁷ Miller, *supra* note 38 (listing criteria given by the Ogden Police Department for identifying a gang member).

⁵⁸ *Id.*

⁵⁹ *Id.*

1. The suspect admits his gang membership; OR
2. Whether in custody or not, a person may also be documented as a gang member if two of the following criteria are met:
 - a. The suspect has been arrested in the commission of a crime where the criminal associates are documented gang members;
 - b. The suspect has been identified as a gang member through the use of a reliable confidential informant, parent or guardian of the suspect, or other documented gang members;
 - c. The suspect has known and identifiable gang tattoos;
 - d. The suspect wears clothing that can be identified as gang specific, either in the clothing itself or the manner in which the clothing is being worn;
 - e. The suspect engages in hand signs and/or uses speech and specific language that is typical of certain gangs and gang sets;
 - f. The suspect was found in the company of known gang members three or more times;
 - g. The suspect has a known moniker that other persons or gang members identify him with;
 - h. The suspect has been identified through other physical evidence or sources proving their associations with known gang members (i.e., photographs, writings, recordings, documents, graffiti, social and electronic media, etc.).⁶⁰

Once the Ogden Police classify a person as a member of Ogden Trece, the court may serve them with the injunction.⁶¹ Ogden Police attempt to target and serve the most active members of the gang first, stating that “we’re making a very good effort to make sure the people we’re serving are the ones we want.”⁶²

D. Results of the Preliminary Injunction

Ogden City claims that since the injunction went into effect, gang related crimes have dropped from 72.5 crimes per month to 54.41 crimes per month.⁶³ However, the city has not provided any data showing that the decline in arrests was directly connected to the injunction. There is no data showing that the city has arrested less members of Ogden Trece, nor is there data showing that the overall crimes attributed to Ogden Trece have declined or become less violent.

The American Civil Liberties Union (ACLU) appealed the decision to issue the permanent injunction and requested a stay; however, the request was denied on

⁶⁰ *Id.*

⁶¹ Rogers, *supra* note 8.

⁶² *Id.* (quoting Ogden Police Chief Jon Greiner).

⁶³ Miller, *supra* note 40.

October 19, 2012.⁶⁴ Therefore, until the Supreme Court of Utah issues an opinion on the constitutionality of the injunction, it will remain in place.

III. THE OGDEN TRECE GANG INJUNCTION IS NOT NARROWLY TAILORED TO A COMPELLING INTEREST

Gang civil injunctions involve restricting certain fundamental rights of the enjoined alleged gang members, namely, the right to due process and the right to assemble and freely associate. Where fundamental rights are involved, strict scrutiny should apply and a regulation limiting those rights may be justified only by a compelling state interest and legislative enactments that are narrowly drawn to achieve that compelling state interest.⁶⁵ Therefore, in order to limit the First Amendment rights of alleged gang members, the State must show that it has a compelling interest in limiting those rights and that the injunction is narrowly tailored to achieve that interest.⁶⁶ Even if the court instead applied intermediate scrutiny, the State would still be required to show an important state interest, and the injunction would still fail. While protecting public safety is an important state interest, the injunction fails narrow tailoring because (A) it is overinclusive where it includes more people and activities than necessary, (B) it is underinclusive where it does not prohibit all gang activity and instead applies only to Ogden Trece members, and (C) it is not tailored to the asserted state interest.

A. *The Ogden Trece Gang Injunction is Overinclusive Where it Includes More People and Activities than Necessary*

A statute or injunction limiting constitutional rights must be narrowly tailored and avoid any unnecessary restrictions upon those rights.⁶⁷ The injunction against Ogden Trece is not narrowly tailored because it restricts more conduct than the State is trying to prevent, and it affects more people than just convicted gang members. In addition to prohibiting unlawful acts, the injunction also criminalizes lawful acts for a select group of individuals.⁶⁸ If the State's goal is to reduce

⁶⁴ Tim Gurrister, *Judge: Trece Injunction in Effect While Utah Supreme Court Reviews It*, STANDARD EXAMINER (Oct. 19, 2012, 8:49 PM), <http://www.standard.net/stories/2012/10/19/judge-trece-injunction-effect-while-utah-supreme-court-reviews-it>.

⁶⁵ *E.g.*, *Reno v. Flores*, 507 U.S. 292, 302 (1993).

⁶⁶ *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (“For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.”). However, the Court analyzed the injunction to determine whether the restrictions are “narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.” *Id.*

⁶⁷ *See id.*

⁶⁸ *See Weber Cnty. v. Ogden Trece*, No. 100906446, slip op. at 2–4 (Utah Dist. Ct. Aug. 20, 2012), available at <http://media.bonnint.net/slc/2501/250103/25010376.pdf>.

violent crime, the prohibition of lawful acts is unnecessary, because Ogden police have failed to show a causal connection between free association and violent crime.

Furthermore, because nongang members have been included in the injunction, more individuals than necessary are losing their constitutional rights.⁶⁹ Because the injunction targets individuals other than convicted gang members, it is overinclusive and cannot be considered narrowly tailored. To make the injunction narrowly tailored, the City of Ogden could instead include only those individuals who have been convicted of a gang-related crime. While there is still an argument against restricting lawful activity, the injunction would at least be narrowly tailored.

B. The Ogden Trece Gang Injunction is Underinclusive Where it Does Not Prohibit All Gang Activity and Instead Applies Only to Ogden Trece Members

The injunction is underinclusive and does not criminalize gang activity by members of all gangs. Regulations are unconstitutionally underinclusive when they contain exceptions that bar one source of a given harm while specifically exempting another in at least two situations. First, if the exception “ensures that the [regulation] will fail to achieve [its] end,” it does not “materially advance its aim.”⁷⁰ Second, exceptions that make distinctions among different kinds of speech must relate to the interest the government seeks to advance.⁷¹

The Ogden Trece gang injunction only applies to one of many gangs that currently exist in Ogden.⁷² Such a distinction “ensures that the [regulation] will fail to achieve [its] end” and does not “materially advance [its] aim.”⁷³ The injunction does not remove the rights of every gang member nor does it enjoin all gang-related activity; it only removes the rights of those alleged to be members of Ogden Trece within the Safety Zone.⁷⁴ Therefore, the injunction is discriminatory. Until all gangs are enjoined, the injunction simply does not address the scope of the problem it is trying to fix.

⁶⁹ See Gurrister, *supra* note 64 (stating that several individuals had been granted their requests to be “opted out” of the injunction, implying that certain individuals who were not active members of the gang were mistakenly enjoined).

⁷⁰ *E.g.*, Metro Lights, L.L.C. v. City of Los Angeles, 551 F.3d 898, 906 (9th Cir. 2009).

⁷¹ *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 418–19 (1993) (noting the “minimal impact” the regulation would achieve as a result of the exception).

⁷² See *Ogden Trece*, slip op. at 1; see also *Prosecutors’ Injunction Targets Ogden Street Gang*, KSL.COM (Aug. 28, 2010, 2:11 PM), <http://www.ksl.com/?nid=148&sid=12190012> (stating that law enforcement will eventually enjoin every gang in Utah).

⁷³ *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 489 (1995).

⁷⁴ See *Ogden Trece*, slip op. at 2 (stating that the injunction is against Ogden Trece members and not gang members in general).

C. The Ogden Trece Gang Injunction is not Tailored to the Asserted State Interest

The injunction is not tailored to a legitimate state interest. If the state interest is in reducing gang violence, then the injunction fails due to the underinclusivity factor above. Even if there were not an underinclusivity issue, there is no substantial evidence that the injunction has been effective in diminishing gang violence. The City asserts that the injunction caused gang-related crime to decline;⁷⁵ however, it has become increasingly difficult to identify Ogden Trece gang members.⁷⁶ Gang members no longer flaunt their gang affiliation.⁷⁷ If gang members are no longer openly stating their affiliations, it is possible that gang violence has *not* in fact decreased, but instead is not being properly identified. Crimes may be occurring at the same rate but not being attributed to gang violence. If this is the case, then police may actually be having a more difficult time fighting gang violence because it is now underground and no longer out in the open. This would completely undermine the argument that the injunction is being used to further the state interest of reducing gang violence. Even if gang-related crimes have decreased, Ogden Police have not verified that the reduction in gang violence is a reduction in Ogden Trece violence.⁷⁸ Members of Ogden Trece may be committing just as many crimes, while other gangs not included in the injunction are committing fewer.⁷⁹ Gang violence may have moved out of the Safety Zone and into another area.⁸⁰ There are simply too many possibilities to definitively say that the injunction has decreased gang-related crime. Correlation does not equal causation. The decline in reported gang-related violence has not been conclusively tied to the injunction, and therefore, the State's objective has not been met.

While the State may be able to show a compelling interest in protecting the public, the Ogden Trece injunction is not narrowly tailored because it is underinclusive, overinclusive, and is not logically related to promoting that interest.

⁷⁵ See Ben Winslow, *Ogden Gang Restraining Orders Now Permanent*, FOX 13 NEWS (Aug. 21, 2012, 12:15 AM), <http://fox13now.com/2012/08/20/ogden-gang-restraining-orders-now-permanent/> (stating that gang violence had decreased by 12%).

⁷⁶ See Miller, *supra* note 38 (discussing the difficulties of identifying gang members now that the injunction is in place).

⁷⁷ See *id.*

⁷⁸ See Winslow, *supra* note 75.

⁷⁹ The City could effectively argue that even if the reduction in gang-related crimes was not directly attributed to Ogden Trece, the injunction was still effective in reducing gang violence overall. However, it is incorrect to assume that restricting the rights of one gang to reduce the crime of another is constitutionally allowable. The State interest of regulating other gangs' crimes is not sufficiently persuasive to justify the injunction solely on Ogden Trece.

⁸⁰ While this may be a temporary solution to the problem, moving the violence is not the same as stopping it for purposes of this injunction.

IV. VIOLATIONS OF CONSTITUTIONAL RIGHTS

The Ogden Trece gang injunction is unconstitutional because: (A) it violates the right to due process; (B) it violates the right to peaceably assemble and the right to “intimate” assembly with family members; and (C) it is void for vagueness.

A. The Ogden Trece Gang Injunction Violates the Right to Due Process

The injunction against Ogden Trece unconstitutionally deprives alleged members of their rights to due process. The Fourteenth Amendment of the United States Constitution prohibits states from depriving a “person of life, liberty, or property, without due process of law.”⁸¹

The Supreme Court has enunciated two alternative tests by which substantive due process is examined. Under the first test, the plaintiff must prove that the governmental body’s conduct “shocks the conscience.” Under the second test, the plaintiff must demonstrate a violation of an identified liberty or property interest protected by the due process clause.⁸²

The injunction against Ogden Trece fails both of these tests.

The first test is the most controversial. It is difficult to argue that an injunction that limits gang violence is not supported by a legitimate, important government interest. Additionally, reducing gang violence on its face is not an activity that is generally shocking to the conscience. However, this is not the correct way to frame the issue. The correct way to frame this issue is whether or not it is constitutional to remove the rights of individuals without an arrest, trial, or conviction for illegal activity. This is something that shocks the conscience.

The due process issue is *not* that a convicted gang member who has committed violent crimes may lose the right to associate with other gang members. The issue is that the State may take away a person’s rights without convicting him of being a gang member or of any other offense. The only action required to remove a person’s liberty is the action of serving him with the injunction. The police become both judge and jury in this situation and determine whether or not a person is “guilty” of being a member of the gang.⁸³ There is no trial or other opportunity for the enjoined party to challenge the injunction prior to its taking effect. If a person wants to be removed from the injunction, he must petition the

⁸¹ U.S. CONST. amend. XIV, § 1.

⁸² *Mercer v. Brunt*, 272 F. Supp. 2d 181, 186 (D. Conn. 2002); *see also* *Rochin v. California*, 342 U.S. 165, 172 (1952) (articulating that the government’s conduct must “shock[] the conscience”); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (stating that the plaintiff must show a violation of a right under the due process clause).

⁸³ *See* *Miller*, *supra* note 38 (describing factors the Ogden Police use to determine whether an individual is a gang member).

court after being served and after his rights have already been taken away. This is more than enough to shock the conscience of the court.

The rights of a violent gang member do not outweigh those of a law-abiding citizen. However, a person does not need to be convicted of anything to have his rights taken away under this injunction. An officer only needs to classify a person as a gang member under the criteria given by the Ogden Police Department.⁸⁴ It is illogical to think that authorities will not sweep up nongang members under this injunction. In fact, authorities already enjoined one individual who claims he is not a gang member and is now forced to fight against his inclusion in the injunction.⁸⁵ Police state that this individual, who is part of a hip-hop group that includes members of Ogden Trece, was seen leaving a party with other alleged members and was seen wearing a hat that says O-Town.⁸⁶ Police claim he once told an officer he was in the gang.⁸⁷ However, the alleged member claims he is not in the gang and has no gang tattoos or even a significant criminal record.⁸⁸ Until the injunction is lifted or a court determines that he is not a gang member, he remains unable to participate in his music group or associate with any persons that are alleged members of Ogden Trece.⁸⁹

The second test requires the plaintiff to “demonstrate a violation of an identified liberty or property interest protected by the due process clause.”⁹⁰ The injunction limits the ability of those enjoined to participate in everyday activities including work, travel, and family functions.⁹¹ Because the due process clause protects life, liberty, and property,⁹² it appears that this injunction is a direct violation of the rights protected under the Fourteenth Amendment. While it is possible for the court to remove an individual from the injunction, enjoined individuals are subject to the injunction until their request is granted.⁹³

Furthermore, if a person is incorrectly served with the injunction, they may not be able to convince the court that the court should remove them even if they are not a gang member. The media portrays the opt-out provision as a simple process; however, court processes are seldom simple and the requirements may be difficult to meet even for those who have never been members of the gang.⁹⁴ In

⁸⁴ *Id.*

⁸⁵ Carlisle, *supra* note 32.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* (identifying the only convictions the alleged member has are for alcohol and marijuana possession).

⁸⁹ *Id.*

⁹⁰ *Mercer v. Brunt*, 272 F. Supp. 2d 181, 186 (D. Conn. 2002).

⁹¹ *See Weber Cnty. v. Ogden Trece*, No. 100906446, slip op. at 2–4 (Utah Dist. Ct. Aug. 20, 2012), available at <http://media.bonnint.net/slc/2501/250103/25010376.pdf>.

⁹² U.S. CONST. amend. XIV, § 1.

⁹³ Gurrister, *supra* note 55.

⁹⁴ For a description of the requirements to opt out of the injunction, see *Ogden Trece*, slip op. at 5–7.

order to opt out of the injunction a person (1) must show that they have “not been arrested for a gang-related crime in the past three years;” (2) “must declare that he/she has not been documented by law enforcement for the past three years *to have been in the company or association of any known active member of Ogden Trece, other than an immediate family member;*” and (3) must have “not obtained any new Ogden Trece . . . gang-related tattoos for the past three years.”⁹⁵ While requirements one and three should be fairly easy for a former or nonmember to prove, requirement two poses a substantial problem. In order to be removed from the injunction, a person must not have associated with any gang members that are not immediate family members for three years.⁹⁶ This means that friends, coworkers, and nonimmediate family members are at risk of being ineligible for the exemption.

It would be plausible for the legislature to enact a law that criminalizes gang activity, or that imposes a harsher punishment (including losing the right to associate with other convicted gang members) for crimes that are committed while operating as a gang. However, these laws should adhere to the rules of criminal procedure and the anti-association clauses should not restrict gang members until they are convicted of a gang-related crime. Police officers should not have the final say in whether or not a person is “guilty” of being a gang member. Individuals have the right to be presumed innocent until proven guilty. This injunction completely sidesteps our criminal justice system and instead instantly assesses guilt on alleged gang members. If the government wishes to criminalize gang activity, it should take the appropriate steps and pass a law through the state legislature. By leaving the power of criminalization with the legislature it creates a check and balance system to ensure justice is served.

B. The Ogden Trece Gang Injunction Violates the Right to Peaceably Assemble and the Right to “Intimate” Assembly with Family Members

The United States Constitution grants every person the right to peaceably assemble.⁹⁷ Authorities cannot remove the rights of alleged gang members purely because of a dislike of their noncriminal expressions or activities, or because of fear. However, courts have held that there is no constitutional right for gangs to assemble.⁹⁸ If the only restriction imposed by the injunction was the inability of gang members to associate and assemble in public for illegal or criminal purposes,

⁹⁵ *Id.* (emphasis added).

⁹⁶ *Id.*

⁹⁷ U.S. CONST. amend. I.

⁹⁸ *See* *People ex rel. Gallo v. Acuna*, 929 P.2d 596, 609 (Cal. 1997) (“We do not, in short, believe that the activities of the gang and its members in Rocksprings at issue here are either ‘private’ or ‘intimate’ as constitutionally defined; the fact that defendants may ‘exercise *some* discrimination in choosing associates [by a] selective process of inclusion and exclusion’ does not mean that the association or its activities in Rocksprings is one that commands protection under the First Amendment.” (alteration in original) (internal citation omitted)).

then no fundamental rights would be affected. However, there are unintended consequences when members of a gang are prohibited from assembling in public.⁹⁹

The injunction also affects another fundamental right: the right to familial association. Persons have the right to “associations with ‘intrinsic’ or ‘intimate’ value.”¹⁰⁰ The phrase “associations with ‘intrinsic’ or ‘intimate’ value,” typically refers to the types of associations that occur between family members.¹⁰¹ Gang members often refer to the gang as their “family,” which is often accurate because members of gangs are often related.¹⁰² It is common for siblings, cousins, or even parents and children to belong to the same street gangs.¹⁰³ In fact, it often becomes expected that family members will join the gang.¹⁰⁴ Because of the strong family ties that often exist within gangs, the prohibition of association between members is not just an issue of restricting gang association; it becomes an issue of restricting family association.¹⁰⁵

The right to associate with family members is one of the most protected rights of association. The Supreme Court has stated that “[f]amily relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one’s life.”¹⁰⁶ The Supreme Court recognized that family relationships should be given special considerations as they are a fundamental part of personal liberty.¹⁰⁷

Many gang injunctions allow an exemption for public association with some immediate family members.¹⁰⁸ However, the Ogden Trece gang injunction has no such exception allowing for familial association.¹⁰⁹ Unlike other overly restrictive injunctions, the Ogden Trece gang injunction is even more restrictive, potentially

⁹⁹ The restriction on association also prohibits enjoined gang members from publicly protesting this injunction, as well as from defending themselves in court together.

¹⁰⁰ *People ex. rel. Reisig v. Acuna*, 106 Cal. Rptr. 3d 560, 578 (Cal. Ct. App. 2010).

¹⁰¹ *See id.*

¹⁰² *Why People Join Gangs*, GANGFREE.ORG, http://www.gangfree.org/gangs_why.html (last visited Sept. 21, 2013).

¹⁰³ *Id.*

¹⁰⁴ *See id.*

¹⁰⁵ The right to assemble and the right to associate are separate issues. However, in this instance, the restriction of the right to assemble directly affects an enjoined member’s right to familial association. If family members are enjoined from assembling in public together, their association is limited. For this reason, the analysis of the enjoined gang member’s right to familial association is included under the right to assemble.

¹⁰⁶ *Roberts v. U.S. Jaycees*, 468 U.S. 609, 619–20 (1984).

¹⁰⁷ *See id.* (“As a general matter, only relationships with these sorts of qualities are likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty.”)

¹⁰⁸ *See, e.g., Martinez v. State*, Nos. 2–08–070–CR, 2–08–071–CR, 2–08–072–CR, 2–08–073–CR, 2–08–074–CR., 2009 WL 383760 (Tex. Ct. App. Feb. 12, 2009).

¹⁰⁹ *See Weber Cnty. v. Ogden Trece*, No. 100906446, slip op. at 1–7 (Utah Dist. Ct. Aug. 20, 2012), available at <http://media.bonnint.net/slc/2501/250103/25010376.pdf>.

barring association with parents, children, and siblings. But even if it included an immediate family exception, it would not be enough to ensure that the right to assemble is not infringed upon. Cousins, grandparents, and other family members often live together and have close relationships, yet they would still not be exempted out of the restriction on association.

C. The Ogden Trece Gang Injunction is Void for Vagueness

The injunction is void for vagueness. A regulation can be impermissibly vague for one of two of reasons. It is impermissibly vague if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits,¹¹⁰ or if it “authorize[s] [or] encourage[s] arbitrary and discriminatory enforcement.”¹¹¹

The Supreme Court held in *Chicago v. Morales* that an antigang loitering ordinance with a similar purpose as this injunction was unconstitutionally vague.¹¹² The Court in *Morales* held that the phrase “with no apparent purpose” in the loitering statute gave too much discretion to law enforcement, and was too vague for an ordinary person to know what was prohibited under the law.¹¹³ The Court further stated that it would be next to impossible for a person to know if they were doing something with an “apparent purpose,” and reasoned that law enforcement officers would be unable to determine a person’s purpose effectively.¹¹⁴

Similarly, many phrases in the Ogden Trece gang injunction are also vague, making it next to impossible for enjoined individuals to understand what actions are prohibited.¹¹⁵ Specifically, the word “annoying” and the phrase “in the presence of” are impermissibly vague and leave far too much discretion to officers enforcing the injunction.¹¹⁶ While many areas of the injunction are ambiguous, this Note will focus on two particular sections: (1) the section restricting intimidation; and (2) the section prohibiting drug use.¹¹⁷ Each section is analyzed below.

¹¹⁰ *Chicago v. Morales*, 527 U.S. 41, 56 (1999).

¹¹¹ *Id.*

¹¹² *See id.* at 45–46, 57.

¹¹³ *Id.* at 51 n.14.

¹¹⁴ *See id.* at 51.

¹¹⁵ *See People ex. rel. Gallo v. Acuna*, 929 P.2d 596, 611 (Cal. 1997) (“No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.” (quoting *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939))).

¹¹⁶ *Weber Cnty. v. Ogden Trece*, No. 100906446, slip op. at 2, 3–4 (Utah Dist. Ct. Aug. 20, 2012), available at <http://media.bonnint.net/slc/2501/250103/25010376.pdf>.

¹¹⁷ *See id.* at 3.

1. *The “Intimidation” Section is Unconstitutionally Broad*

The “No Intimidation” section of the injunction prohibits the harassment and threatening of witnesses of illegal gang activity.¹¹⁸ The section prohibits, “[c]onfronting, intimidating, *annoying*, harassing, threatening, challenging, provoking, assaulting *any person known to be a witness to any activity of Ogden Trece*, known to be a victim of any activity of Ogden Trece, or known to have complained about any activity of Ogden Trece.”¹¹⁹ The broad language used in this section poses several problems. First, the word “annoying” is extremely subjective. What qualifies as annoying? The Oxford English Dictionary defines annoying as “[t]he giving of trouble or vexation.”¹²⁰ It would be impossible for an ordinary person to know if something he is doing will be interpreted as annoying. Since a person cannot adjust their behavior to ensure they will not “annoy” someone, this portion of the injunction is vague and therefore void.¹²¹

Next, the description of “witness” is also overly vague. The injunction states that members are not to intimidate “[a]ny person known to be a witness to any activity of Ogden Trece.”¹²² The injunction does not specify that a person must have witnessed any *illegal* activity. Therefore, this could apply to any person who had witnessed any gang member at any time. An activity could be as simple as an alleged member buying groceries, or as sinister as a murder. The injunction does not specify whom this section applies to, and thus gives law enforcement too much leeway in enforcing it.¹²³

2. *The Restrictions on Drugs are Unconstitutionally Broad*

The restriction on drugs states:

Stay Away from Drugs and Drug Paraphernalia: Without a prescription, 1) selling, possessing, or using any controlled substance or related paraphernalia, as defined in U.C.A. Section 58-37a-3; 2) knowingly remaining in the presence of anyone selling, possessing, or using any controlled substance or such related paraphernalia; or 3) knowingly remaining in the presence of any controlled substance or such related paraphernalia.¹²⁴

¹¹⁸ *Id.*

¹¹⁹ *Id.* (emphasis added).

¹²⁰ 1 THE OXFORD ENGLISH DICTIONARY 342 (Murray et al. eds., 1961).

¹²¹ See *Chicago v. Morales*, 527 U.S. 41, 56 (1999).

¹²² *Ogden Trece*, slip op. at 3.

¹²³ See *Morales*, 527 U.S. at 56–57, 64.

¹²⁴ *Ogden Trece*, slip op. at 3.

There are two main issues with the drug restriction section of the injunction. First, there is no definition for “remaining in the presence of.”¹²⁵ Second, the injunction does not distinguish between someone/alleged member associating with someone selling illegal drugs and someone walking into a pharmacy. The injunction does not account for persons in the presence of alleged members who may have legitimate prescriptions. It also does not exempt places that legally sell controlled substances. According to the plain language of the injunction, an alleged member could violate the injunction simply by walking into a pharmacy.

At least one court has recognized that this is a problem with these injunctions.¹²⁶ In particular, the California Court of Appeals found a similar clause in a gang injunction unconstitutional vague because it did not specify or exclude areas such as pharmacies.¹²⁷

IV. CONCLUSION

Gang injunctions are becoming more prevalent. There is a valid interest in keeping neighborhoods and cities safe from gang violence. However, the safety of some should not come at the expense of infringing another’s constitutional rights. Gang injunctions affect the due process rights of those enjoined. They affect the ability of alleged gang members to associate with their families and the right to peaceably assemble. They are often overbroad, vague, and both over- and underinclusive. Criminalizing lawful activity is not the answer to decrease crime; it only creates artificial crime and a false sense of security for residents. Law enforcement must find a less restrictive way to reach the result that it desires. Violating the rights of persons who have not been convicted of a crime is an unacceptable answer to the gang problem. The injunction against Ogden Trece should be overturned as unconstitutional.

¹²⁵ *Id.*

¹²⁶ *See People ex. rel. Reisig v. Acuna*, 106 Cal. Rptr. 3d 560, 580 (Cal. Ct. App. 2010) (holding that while the gang injunction could be enforced against enjoined members, the drug restrictions were impermissibly vague and did not distinguish between legal and illegal uses of controlled substances).

¹²⁷ *See id.*