FAMILY TIES OR CRIMINAL CONTACTS: A CASE FOR THE APPOINTMENT OF COUNSEL IN CIVIL GANG INJUNCTION PROCEEDINGS THAT AFFECT FAMILY RELATIONSHIPS.

In mid-2007 Antonio Buitrago faced a civil action that would prohibit him from meeting his cousin within a sixty block area of San Francisco.[1] This suit was not brought in response to any specific criminal behavior of Mr. Buitrago, nor was it brought in any criminal court.[2] If the action was successful, however, both cousins would face up to six months in the county jail should they decide to have a family get-together within a specified public zone.[3] Moreover, because this suit was brought under civil law it was not clear whether the court would be required to appoint a lawyer on Mr. Buitrago's behalf.[4] Thus, in mid-2007 it appeared that Mr. Buitrago would soon be facing the bleak situation of self-representation before the San Francisco Superior Court in order to preserve his right to see his cousin in public.[5]

---

[1] *See* Complaint for Injunctive Relief Against the Norteno Criminal Street Gang, People v. Norteno, No. CGC 07-464492 (San Francisco Super. Ct. June 21, 2007), [hereinafter "Norteno Complaint"]; *see also* Memorandum of Points and Authorities in Opposition to Plaintiff's Ex Parte Application for Order to Show Cause Re: Preliminary Gang Injunction, at 6, People v. Norteno, No. CGC 07-464492 (San Francisco Super. Ct. Sept. 5, 2007) [hereinafter "Opposition to Application for OSC"].

[2] Opposition to Application for OSC, Exhibit A at 1, People v. Norteno, No. CGC 07-464492 (San Francisco Super. Ct. Sept. 5, 2007) ("I [Antonio Buitrago] do not have a criminal history").

[3] Those named as gang members are enjoined by a court order from "[s]tanding, sitting, walking, driving, gathering, or appearing anywhere in the public view or any place accessible by or to the public, with any known member of the NORTENO Criminal Street Gang, excluding: 1) when all individuals are inside a school in class or school business; and 2) when all individuals are inside a church." Order to Show Cause Re: Preliminary Gang Injunction, at 17, People v. Norteno, No. CGC 07-464492 (San Francisco Super. Ct. June 21, 2007) [hereinafter "OSC"]; *see* CAL. PENAL CODE § 166(a)4 (West 2008) ("(a) Except as provided in subdivisions (b), (c), and (d), every person guilty of any contempt of court, of any of the following kinds, is guilty of a misdemeanor: . . . (4) Willful disobedience of the terms as written of any process or court order or out-of-state court order, lawfully issued by any court, including orders pending trial."); Memorandum of Points and Authorities in Opposition to Application for OSC, at 1, People v. Norteno, No. CGC 07-464492 (San Francisco Super. Ct. Sept. 5, 2007).

[4] Iraheta v. Superior Court, 70 Cal. App. 4th 1500, 1514 (Ct. App. 1999) (finding no right to counsel in a gang injunction case).

[5] *See id.*; Norteno Complaint, No. CGC 07-464492 (San Francisco Super. Ct. June 21, 2007); 19A CAL. JUR. 3D *Criminal Law* § 109 (2001) ("The following is a suggested admonition to a defendant regarding the dangers and disadvantages of self-representation: 1. Self-representation is almost always unwise and the

Mr. Buitrago is a 23-year-old Latino.[6] He was raised in San Francisco's Mission District[7] with his three sisters and his cousin, Antonio Garcia, whom he calls "brother."[8] Mr. Buitrago is in a committed relationship of seven years and has a young daughter Alyssa.[9] Like most young parents, he hopes for a better life for his family.[10] It is because of this hope that Mr. Buitrago has gone back to school to get his GED.[11] Mr. Buitrago sees the Mission District as his home, so even though it is a tough neighborhood, he has no plans to leave.[12] The Mission District is where his friends live, where he volunteers his time to work with local "at risk" youth, and where he partakes in community events like the Dia de los Muertos.[13]

---

defendant may conduct a defense to his or her own detriment; 2. Defendant will . . . get no help from the judge; 3. The prosecution will be represented by experienced professional counsel who will have the advantage of skill, training, education, experience and ability; and 4. Defendant will have no special library privileges, will receive no extra time for preparation and will have no staff of investigators at his or her beck and call.").

[6] Opposition to Application for OSC, Exhibit A at 1, People v. Norteno, No. CGC 07-464492 (San Francisco Super. Ct. Sept. 5, 2007).

[7] The Mission District is a southern neighborhood in San Francisco that has been described as a "flamboyant mosaic" that boasts "the most flourishing mural scene in the country" and is home to "solidly working-class . . . Latinos" and "radicals . . . [of] failed revolutions." Gregory Dicum, *San Francisco's Mission District: Eclectic, Eccentric, Electric*, N.Y. TIMES, at http://travel.nytimes.com/2005/11/20/travel/20next.html Nov. 20, 2005 (last visited Sept. 21, 2008); Opposition to Application for OSC, Exhibit A at 1-2, People v. Norteno, No. CGC 07-464492 (San Francisco Super. Ct. Sept. 5, 2007).

[8] Opposition to Application for OSC, Exhibit A at 2, People v. Norteno, No. CGC 07-464492 (San Francisco Super. Ct. Sept. 5, 2007).

[9] *Id.* at 5.

[10] *Id.* at 5.

[11] *Id.* at 1-2.

[12] From 2004-2007 out of the ten districts in San Francisco the Mission District averaged the fourth highest in homicide. *Mayor's Office of Criminal Justice Report on Public Safety Condition* 4 (July 23, 2007); Norteno Complaint, at 3, People v. Norteno, No. CGC 07-464492 (San Francisco Super. Ct. June 21, 2007). The complaint alleges that the gang Norteno "dominates the neighborhood with verbal and physical intimidation . . . ." Indeed, on March 29, 2006, Mr. Buitrago was shot in the back by unknown assailants in his neighborhood. Opposition to Application for OSC, Exhibit A at 7-8, People v. Norteno, No. CGC 07-464492 (San Francisco Super. Ct. Sept. 5, 2007).

[13] Opposition to Application for OSC, Exhibit A at 9, People v. Norteno, No. CGC 07-464492, (San Francisco Super. Ct. Sept. 5, 2007).

However, some of Mr. Buitrago's activities in the Mission District have a grittier side. He sings "gangsta rap."[14] He continues to associate with some of his childhood friends who are admitted gang members.[15] He has declined to help officers in a gang-related investigation.[16] Moreover, his ties with gang members are enough for a San Francisco police officer, Mario Molina, to declare that Mr. Buitrago is himself a gang member and that he goes by the gang nickname "Tone."[17] In support of motions by the San Francisco City Attorney, Officer Molina declared that, by being a gang member, Mr. Butragio contributes to the higher crime rate that the Mission District endures.[18] Because of these factors, Mr. Buitrago found himself facing a civil gang injunction lawsuit initiated by the San Francisco City Attorney's Office.[19]

Civil gang injunctions are an attempt to combat the problem of gangs by prohibiting alleged gang members from engaging in specific activities within a specific area.[20] Civil gang injunctions are empowered by the doctrine of public nuisance, which provides a cause of action for an unreasonable and substantial interference with a right

[14] Opposition to Application for OSC, Exhibit A at 4-5, People v. Norteno, No. CGC 07-464492 (San Francisco Super. Ct. Sept. 5, 2007); Expert Declaration of SFPD Officer Molina In support of Ex Parte Application for Order To Show Cause Re: Preliminary Gang Injunction and Preliminary Gang Injunction (Part1 of 2 Parts) at 35, People v. Norteno, No. CGC 07-464492 (San Francisco Super. Ct. June 21, 2007) [hereinafter Expert Declaration].
[15] Opposition to Application for OSC, Exhibit *A* at 5, People v. Norteno, *No.* CGC 07-464492 (San Francisco Super. Ct. Sept. 5, 2007).
[16] Expert Declaration, at 36, People v. Norteno, No. CGC 07-464492 (San Francisco Super. Ct. June 21, 2007).
[17] Expert Declaration, at 35-36. People v. Norteno, No. CGC 07-464492 (San Francisco Super. Ct. June 21, 2007); Opposition to Application for OSC, Exhibit A at 1, People v. Norteno, No. CGC 07-464492 (San Francisco Super. Ct. Sept. 5, 2007).
[18]Expert Declaration, at 1-6, People v. Norteno, No. CGC 07-464492 (San Francisco Super. Ct. June 21, 2007). From 2004-2007 out of ten districts in San Francisco the Mission District averages the fourth highest in homicide. *Mayor's Office of Criminal Justice Report on Public Safety Condition* 4 (July 23, 2007).
[19] Norteno Complaint, People v. Norteno, No. CGC 07-464492 (San Francisco Super. Ct. June 21, 2007); Expert Declaration, at 35-36 People v. Norteno, No. CGC 07-464492 (San Francisco Super. Ct. June 21, 2007).
[20] People ex rel. Gallo v. Acuna, 14 Cal. 4th 1090, 1120-1123 (1997); Norteno Complaint, at 3-5 People v. Norteno, No. CGC 07-464492 (San Francisco Super. Ct. June 21, 2007).

common to the general public.[21] Under a civil gang injunction, certain activities of the named individuals are declared a public nuisance because of their alleged gang involvement.[22] The individuals named in the suit are then barred from the activities that enable the gang to function and thereby cause a nuisance.[23] Many of these prohibited activities are already illegal.[24] For instance, the gang injunction that Mr. Buitrago faced would forbid him from committing such crimes as trespassing or selling, possessing, or manufacturing a controlled substance.[25] However, the injunction would also forbid Mr. Buitrago from many lawful activities, such as wearing red clothing, being out in public between ten o'clock in the evening and sunrise, and associating with any other alleged gang member.[26]

One controversial aspect of these suits is that they attempt to combat a criminal problem through the civil arena.[27] A defendant in a criminal action is entitled to far more safeguards than a defendant in a civil action.[28] In particular, the right to counsel in

---

[21] Restatement (Second) Torts § 821B (1979); *see also* CAL. CIV. CODE 3480 (West 2008) ("A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal."); *cf.* People *ex rel* Gallo v. Acuna, 14 Cal. 4th 1090, 1102-1106 (1997).

[22] Norteno Complaint, at 2-3, People v. Norteno, No. CGC 07-464492 (San Francisco Super. Ct. June 21, 2007).

[23] Flahive v. City of Dana Point, 72 Cal. App. 4th 241, 244, 245 n.5 (Ct. App. 1999) ("[California] Civil Code section 3491 provides three remedies for a public nuisance: (1) a criminal proceeding; (2) a civil action; or (3) abatement . . . . In its purest sense "abatement" is the act of eliminating the condition that causes the nuisance.").

[24] Norteno Complaint, at 15, People v. Norteno, No. CGC 07-464492 (San Francisco Super. Ct. June 21, 2007) (praying for "an Order enjoining and restraining NORTENO and its members, associates, affiliates, recruits, and anyone else acting on its behalf, from committing crimes . . . and any other conduct amounting to a nuisance . . . .").

[25] Norteno Complaint, at 16, People v. Norteno, No. CGC 07-464492 (San Francisco Super. Ct. June 21, 2007).

[26] *Id.* at 16-17.

[27] *Id.* at 16-18.

[28] *See* People v. Englebrecht, 88 Cal. App. 4th 1236, 1253-57 (Ct. App. 2001) (finding there is no right to a jury trial in a civil gang injunction action, and the standard of clear and convincing evidence is used in the determination of such actions); *see also* Iraheta v. Superior Court, 70 Cal. App. 4th 1500, 1514 (Ct. App. 1999) (finding no right to counsel in a civil gang injunction action). In contrast, for the standards used in criminal cases, *see* U.S. Const. amend. VI ("In criminal prosecutions, the accused shall enjoy the right [to a

criminal cases is guaranteed to a defendant,[29] whereas in civil cases, one is provided with counsel only in special circumstances.[30] Moreover, a California appellate decision, *Iraheta v. Superior Court,* held that civil gang injunctions were not the kind of civil case that warranted the appointment of counsel.[31] Specifically, the court in *Iraheta* determined that "[t]o expand the due process right of legal counsel to the alleged gang members in this case would be unprecedented, and would result in the expansion of the right to counsel to a number of other civil actions."[32] Thus, if one is targeted by a civil gang injunction, and cannot afford a lawyer, they must represent themselves in their own defense against government-employed attorneys or face a default judgment.

Mr. Buitrago's situation is particularly unusual because the injunction he faced infringed upon a fundamentally intimate sphere: his family.[33] Specifically, the injunction Mr. Buitrago faced alleged that both he and his cousin, Antonio Garcia, were gang members and therefore sought to enjoin them from meeting together in public.[34] Thus, in mid-2007 Mr. Buitrago found himself facing the prospect of litigation that would have

---

trial] by an impartial jury."); Clark v. Ariz., 548 U.S. 735, 738 (2006) ("a defendant is innocent unless and until the government proves beyond a reasonable doubt each element of the offense charged"); Gideon v. Wainwright, 372 U.S. 335, 343-44 (1963) (finding a right to counsel in criminal actions). The California courts have expressed concern in situations where "the membrane separating civil issues from criminal charges . . . is especially thin." Gonzales v. Superior Court. 117 Cal. App. 3d 57, 65 (Ct. App. 1980).

[29] Gideon v. Wainwright, 372 U.S. 335, 342-44 (1963) (finding a right to counsel in criminal actions).

[30] Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 25-27 (1981); White v. Bd. of Med. Quality Assurance, 128 Cal. App. 3d 699, 707 (Ct. App. 1982) (holding that the general rule is that there is no due process right to counsel in civil cases).

[31] Iraheta v. Superior Court, 70 Cal. App. 4th 1500, 1515 (Ct. App. 1999) (finding no right to counsel in a civil gang injunction action).

[32] *Id.*

[33] Expert Declaration, at 35, 49, People v. Norteno, No. CGC 07-464492 (San Francisco Super. Ct. June 21, 2007); Opposition to Application for OSC, at 8-9 People v. Norteno, *No.* CGC 07-464492 (San Francisco Super. Ct. Sept. 5, 2007).

[34] Expert Declaration, at 35, 49, People v. Norteno, No. CGC 07-464492 (San Francisco Super. Ct. June 21, 2007); Opposition to Application for OSC, at 8-9 People v. Norteno, *No.* CGC 07-464492 (San Francisco Super. Ct. Sept. 5, 2007).

barred him from meeting his cousin in public, without the benefit of an attorney.[35] Under the terms of the injunction, if Mr. Butragio were to leave from school, cross the street into his neighborhood, and see his cousin, he would have to cross back over to the other side of the street, or pass by his cousin and act as though they were strangers.[36] If Mr. Buitrago were to stop and talk to his cousin in public, he could be prosecuted and end up spending up to six months in the county jail.[37]

This comment argues that when an individual is targeted by a civil gang injunction that interferes with that individual's family relationships, due process requires the appointment of counsel for that individual.[38] This comment does not argue that civil gang injunctions should be prohibited, or even that civil gang injunctions should not be able to enjoin family members from seeing each other in public.[39] Part I discusses the

[35] Those enjoined under the injunction are prohibited from "standing sitting walking driving gathering or appearing in public." Norteno Complaint, at 17, People v. Norteno, No. CGC 07-464492 (San Francisco Super. Ct. June 21, 2007).

[36] The Precita center where Mr. Buitrago is taking classes is at 534 Precita Avenue, which is on the border of the injunction zone and his home neighborhood. *See* Norteno Complaint, at 2, People v. Norteno, No. CGC 07-464492 (San Francisco Super. Ct. June 21, 2007); Opposition to Application for OSC at 15, Exhibit A at 3, People v. Norteno, No. CGC 07-464492 (San Francisco Super. Ct. Sept. 5, 2007).

[37] CAL. PENAL CODE § 166 (West 2008) ("(a) Except as provided in subdivisions (b), (c), and (d), every person guilty of any contempt of court, of any of the following kinds, is guilty of a misdemeanor: . . . (4) Willful disobedience of the terms as written of any process or court order or out-of-state court order, lawfully issued by any court, including orders pending trial."); Opposition to Application for OSC, at 1, People v. Norteno, No. CGC 07-464492 (San Francisco Super. Ct. Sept. 5, 2007).

[38] The basic argument functions by assembling three guidelines. First, "[t]he essence of due process is the requirement that 'a person in jeopardy of serious loss (be given) notice of the case against him and opportunity to meet it.'" Mathews v. Eldridge, 424 U.S. 319, 348 (1976) (quoting Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 171-172 (1951) (Frankfurter, J., concurring). Second, "recent jurisprudence restricts the reach of the protections of substantive due process primarily to liberties 'deeply rooted in this Nation's history and tradition.'" Armendariz v. Penman, 75 F.3d 1311, 1319 (9th Cir. 1996) (quoting Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977)). Third, "the institution of the family is deeply rooted in this Nation's history." Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977).

[39] There is already a wealth of law review articles on the constitutional validity and desirability of civil gang injunctions. Arguments in support of gang injunctions are described in the following: Gregory Walston, *Taking the Constitution at it's Word: A Defense of the Use of Anti-Gang Injunctions*, 54 U. MIAMI L. REV. 47 (1999); Bergen Herd, *Injunctions as a Tool to Fight Gang-Related Problems in California After People ex rel. Gallo v. Acuna: A Suitable Solution?* 28 GOLDEN GATE U. L. REV. 629 (1998). Arguments against gang injunctions are described in the following: Joan Howarth, *Toward the Restorative Constitution: A Restorative Justice Critique of Anti-Gang Public Nuisance Injunctions*, 27 HASTINGS CONST. L.Q. 717 (2000); Mathew Werdeger, *Enjoining the Constitution: The Use of Public Nuisance*

problem of gangs and how civil gang injunctions have emerged to combat them. Part II explores factors considered for the appointment of counsel in civil cases and why family relationships put a personal interest at stake that warrants such appointment. Finally, Part III explores how the government's interests and the risk of erroneous decisions in civil gang injunction proceedings that interfere with family relationships further warrant the appointment of counsel.

I. THE RISE OF THE CIVIL GANG INJUNCTION

In order to gain a nuanced understanding of civil gang injunctions and to discuss them effectively, it is important to first understand how and why they arose. The proposition that gangs are a serious problem is not a controversial one.[40] A ten-year study by the Institute for Intergovernmental Research revealed that from 1996 to 2006 the total number of gangs in the United States averaged around 25,000.[41] Regardless of whether gang violence is a symptom or root cause of a larger social issue, most can agree that in light of such statistics gang violence serves as a blight upon communities and that their harmful activities should be stopped.[42] Enter the power of injunction.

An injunction is a judicial order requiring a person to do or refrain from doing certain acts.[43] In this capacity injunctions have served as an age-old remedy to solve state

---

Abatement Injunctions Against Urban Street Gangs. 51 STAN. L. REV. 409 (1999). This article also does not address the proper standard a court should employ in deciding whether to issue a gang injunction.

[40] Even the ACLU, which has stated that civil gang injunctions are "futile" and based on a "false premise," admits that a successful curtailment of gangs would "markedly enhance the safety and security of the innocent public." ACLU FOUNDATION OF SOUTHERN CALIFORNIA, FALSE PREMISES, FALSE PROMISES: THE BLYTHE STREET GANG INJUNCTION AND ITS AFTERMATH, at 44 (1997).

[41] National Youth Gang Survey Analysis, *Measuring the Extent of Gang Problems*, available at http://www.iir.com/nygc/nygsa/measuring_the_extent_of_gang_problems.htm (last visited Apr. 13, 2008).

[42] ACLU FOUNDATION OF SOUTHERN CALIFORNIA, FALSE PREMISES, FALSE PROMISES: THE BLYTHE STREET GANG INJUNCTION AND ITS AFTERMATH, at 44 (1997).

[43] 43A C.J.S. *Injunction* § 1 (2008).

problems.[44] However, the use of injunctions against gang violence is fairly recent, occurring first in 1981 in Los Angeles,[45] and not coming into widespread use until the early 1990s.[46] Since then, despite inconclusive and contradictory reports,[47] civil gang injunctions have gained popularity and are now regularly used throughout California.[48] This proliferation of civil gang injunction litigation has been enabled through the tacit approval of the California Supreme Court in its 1997 decision *People ex rel. Gallo v. Acuna*.[49] In *Acuna* the court determined that gang members could be enjoined from meeting in public because their presence together constituted a public nuisance.[50] In so ruling, the court rejected a host of constitutional arguments, including alleged violations

[44] In the early eighteenth century, public nuisance law actually became a catch-all criminal action and was defined as "an offense against the public, either by doing a thing which tends to the annoyance of all the King's subjects, or by neglecting to do a thing which the common good requires." EDWARD ALLEN, CIVIL GANG ABATEMENT: THE EFFECTIVENESS AND IMPLICATIONS OF POLICING BY INJUNCTION 54 (LFB Scholarly Publishing LLC 2004); Also, there is an American tradition of using nuisance as a catch-all to solve state problems. *See In re* Debs, 158 U.S. 564 (1895) (utilizing the doctrine of public nuisance to stop unions in their efforts during the Pullman car strikes).

[45] Mathew Werdeger, *Enjoining the Constitution: The Use of Public Nuisance Abatement Injunctions Against Urban Street Gangs*, 51 STAN. L. REV. 409, 414 (1999).

[46] EDWARD ALLEN, CIVIL GANG ABATEMENT: THE EFFECTIVENESS AND IMPLICATIONS OF POLICING BY INJUNCTION 65-66 (LFB Scholarly Publishing LLC 2004).

[47] The studies of effectiveness range from positive, to negative, to inconclusive. *See* Cheryl L. Maxson, *It's Getting Crazy Out There: Can a Civil Gang Injunction Change a Community?* 4 CRIMINOLOGY & PUB. POL'Y 577 (2005) (finding mixed results on the effectiveness of civil gang injunctions); ACLU FOUNDATION OF SOUTHERN CALIFORNIA, FALSE PREMISES, FALSE PROMISES: THE BLYTHE STREET GANG INJUNCTION AND ITS AFTERMATH (1997) (finding that civil gang injunctions are ineffective); *The Effects of Civil Gang Injunctions on Reported Violent Crime: Evidence from Los Angeles County*, 45 J.L. & ECON. 60 (2002) (finding a 5%-10% decrease in violent crime the first year after an injunction is imposed); JUSTICE POLICY INSTITUTE, GANG WARS: THE FAILURE OF ENFORCEMENT TACTICS AND THE NEED FOR EFFECTIVE PUBLIC SAFETY STRATEGIES (2007) (reporting that despite widespread use of gang injunctions, Los Angeles remains the gang capital of the world).

[48] EDWARD ALLEN, CIVIL GANG ABATEMENT: THE EFFECTIVENESS AND IMPLICATIONS OF POLICING BY INJUNCTION 54 (LFB Scholarly Publishing LLC 2004) (Appendix A lists 41 such injunctions issued between 1992 and 2001). Also, some of the California Civil Code now is built around abating criminal action through the device of nuisance. *See, e.g.,* CAL. HEALTH & SAFETY CODE § 11570 (West 2008) ("Every building or place used for the purpose of unlawfully selling, serving, storing, keeping, manufacturing, or giving away any controlled substance . . . is a nuisance . . . .").

[49] People *ex rel.* Gallo v. Acuna, 14 Cal. 4th 1090, 1125 (1997).

[50] *Id*.

of the right to assembly, the right to free speech, and the void-for-vagueness and overbreadth doctrines.[51]

The *Acuna* decision begins with a recounting of the horrific activities of the VST gang in the town of Rocksprings.[52] Due to gang activity, the residents of Rocksprings had their garages used as urinals, and their front lawns as drug bazaars.[53] Trapped within their homes, the residents of Rocksprings could do little more than stand by as murder, vandalism and theft became commonplace neighborhood events. [54] In describing these activities, the court paints a picture of an "urban war zone" where the members of the "community are prisoners in their own homes."[55] In such a situation the demand to stop such gang activities flows quite naturally from a desire to assure ordinary citizens "[t]he freedom to leave one's house and move about at will, and to have a measure of personal security."[56] Moreover, because the doctrine of public nuisance was such a well-established legal principle, its use to empower a civil gang injunction seemed relatively uncontroversial.[57]

---

[51] *Id.* at 1110-20.
[52] *Id.* at 1100.
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.* at 1125; *see also* City of Chicago v. Morales, 527 U.S. 41, 98, 115 (1999) (Thomas, J., dissenting) (finding anti-gang-loitering is not void for vagueness). The dissenters Justice Scalia and Justice Thomas predicated parts of their opinions to find the anti-gang loitering statute Constitutional upon their outrage towards atrocious gang activities stating that the "The human costs exacted by criminal street gangs are inestimable." *Id* at 98. Or "the people who will suffer from our lofty pronouncements [which strikes down the gang loitering ordinance] are people like Ms. Susan Mary Jackson; people who have seen their neighborhoods literally destroyed by gangs and violence and drugs. They are good decent people who must struggle to overcome their desperate situation, against all odds, in order to raise their families, earn a living, and remain good citizens." *Id.* at 115.
[57] *See Acuna*, 14 Cal. 4th at 1102-06.

Few states, however, have contemplated using the doctrine of public nuisance to combat crime, and fewer still have actually used it.[58] In *City of New York v. Andrews*, a New York court considered an action similar to a civil gang injunction against a pimp and prostitution ring.[59] New York City sought to ban the ring's participants from public view within the Queens Plaza area between the hours of eleven o'clock in the evening and seven o'clock in the morning.[60] The New York court refused to issue the injunction partly on the grounds that it was an inappropriate use of civil authority and that the "prosecution of criminal matters should be left to criminal courts."[61] The *Acuna* court, by contrast, was not concerned with this distinction: "whether [the nuisance caused] be a

---

[58] EDWARD ALLEN, CIVIL GANG ABATEMENT: THE EFFECTIVENESS AND IMPLICATIONS OF POLICING BY INJUNCTION 249 (LFB Scholarly Publishing LLC 2004). Attempts to obtain gang injunctions in New York City and Phoenix, Arizona, have been denied. As of 2004 the only successful gang injunction outside of California has occurred in Austin and San Antonio, Texas. This is not to say that states outside California have sought civil recourse against gangs. In fact, much harsher civil solutions than civil gang injunctions have been devised and implemented. The Chicago suburb of Cicero, for instance, passed a gang banishment ordinance, under which those identified as gang members and determined to be a threat to the community were required to leave town and never return, or else face a $500-a-day fine. An Ordinance Providing for the Enforcement of Gang Free Zones in the Town of Cicero, Ordinance No 111-99 (April 1999), amending Cicero Code of Ordinances ch. 35. For extensive and thorough commentary on this particular case, *see* Stephanie Smith, *Civil Banishment Of Gang Members: Circumventing Criminal Due Process Requirements?* 67 U. CHI. L. REV. 1461 (2000).

[59] City of New York v. Andrews, 719 N.Y.S.2d 442, 536-538 (Sup. Ct. 2000).

[60] *Id.* at 447. The complete list of relief sought included a prohibition of: "A. Standing, sitting, walking, driving, gathering or appearing anywhere in public view; B. Loitering for the purpose of engaging in a prostitution offense, as defined by New York Penal Law Section 240.37; C. Committing an act of prostitution and/or promoting prostitution as defined by Penal Law Sections 230.00, and 230.15 et seq.; D. Collecting, receiving, soliciting money, drugs or any other thing of value for prostitution services rendered or to be rendered; E. Possessing any weapons including, but not limited to, knives, box cutters, razors, concealed or loaded firearms, and any other illegal weapon as defined in the New York State Penal Law, and any other object capable of inflicting serious bodily injury; F. Blocking free access to the public sidewalks, streets and the areas surrounding the Subject Neighborhood; G. Approaching individuals or confronting, intimidating, annoying, harassing, threatening, challenging, provoking, assaulting or doing anything to obstruct or delay the free flow of pedestrian traffic; H. Approaching individuals or confronting, intimidating, annoying, harassing, threatening, challenging, provoking, assaulting or doing anything to obstruct or delay the free flow of vehicular traffic; I. Littering or causing others to litter condoms and condom wrappers in the streets and sidewalks; J. Urinating in the streets, on the sidewalks, in alleyways, or anywhere in public view; K. Trespassing or encouraging others to trespass on any private property; L. In any manner confronting, intimidating, annoying, harassing, threatening, challenging, provoking, assaulting and/or battering any residents, patrons or person or persons who have provided information in support of this Complaint and in Support for Plaintiff's request for a Temporary Restraining Order and Preliminary Injunction." *Id.* at 477 n.2.

[61] *Id.* at 455.

criminal nuisance or not is wholly immaterial."[62] However, by failing to carefully examine the criminal/civil distinction, the courts have left defendants facing civil gang injunctions in one of the gray areas of due process: the appointment of counsel in civil cases.[63]

II. WHEN THE RIGHT TO COURT-APPOINTED COUNSEL ATTACHES IN CIVIL CASES

The U.S. Supreme Court's decision in *Gideon v. Wainright* guaranteed the right to counsel in criminal cases under the Sixth Amendment.[64] The right to counsel in civil cases, however, is not based on the Sixth Amendment, but rather upon the Due Process Clause of the Fourteenth Amendment, which requires court-appointed counsel only in select situations.[65] The recognition of the right to counsel in civil cases originated in *Mathews v. Eldridge*, where the Supreme Court found that "[d]ue process is flexible and calls for such procedural protections as the particular situation demands."[66] To this end, the Court held that the identification of the specific dictates of due process required the consideration of three factors: 1) the private interests at stake, 2) the risk of an erroneous deprivation, and 3) the government's interest involved.[67]

This general test was refined in *Lassiter v. Department of Social Services* to specifically evaluate at which times due process requires the appointment of counsel in a

---

[62] *Acuna*, 14 Cal. 4th at 1108.
[63] As late as 2001, a California appellate court indicated in dictum that "the Constitutional right to counsel in civil cases is evolving." *In re* Angel, 93 Cal. App. 4th 1074, 1080 (Ct. App. 2001). Other California courts have also expressed concern in situations where "the membrane separating civil issues from criminal charges . . . is especially thin." Gonzales v. Superior Court, 117 Cal. App. 3d 57, 65 (Ct. App. 1980). Civil gang injunctions and the right to counsel are precisely such a scenario.
[64] Gideon v. Wainwright, 372 U.S. 335, 344-345 (1963).
[65] Lassiter v. Dep't of Soc. Servs, 452 U.S. 18, 26-28 (1981) (finding no due process requirement for the appointment counsel for indigent parents in a proceeding for the termination of parental status).
[66] Mathews v. Eldridge, 424 U.S. 319, 334 (1976).
[67] *Id.* at 334-35.

civil case.[68] The *Lassiter* test first asks if there is a presumption against the right to counsel.[69] Such a presumption is imposed so long as the action does not threaten to result in a "deprivation of physical liberty."[70] The next step involves weighing the presumption, if it exists, against the three *Eldridge* factors.[71] Thus, under *Lassiter*, in order to determine if there is a right to counsel in a civil proceeding, the court must first determine whether a presumption against the right to counsel exits, and, if such a presumption does exist, then the court must measure the net weight of the *Eldridge* factors against the presumption.[72]

Using these basic guidelines, the California courts and the U.S. Supreme Court have acknowledged the right to counsel in a variety of civil situations, including child custody proceedings,[73] child dependency proceedings,[74] juvenile commitment hearings,[75] parole revocation proceedings,[76] and contempt-of-court cases.[77] California

---

[68] *Lassiter*, 452 U.S. at 31-32. It is interesting to note that the Court observed that even though there was no due process requirement, "[a] wise public policy, however, may require that higher standards be adopted than those minimally tolerable under the Constitution." *Id.* at 33.
[69] *Id.* at 31.
[70] *Id.* at 30. "Physical liberty" as used in *Lassiter* seems to encompass direct incarceration, no matter how "brief." *Id.* In contrast, the term "physical liberty," in the modern case law, seems to have gained a much broader meaning. For example, the test to show a deprivation of physical liberty has been phrased as a requirement that "petitioners . . . establish that [the] civil proceedings may deprive them of an interest that is as fundamental as a right to physical liberty or as paramount as the right to care, custody and management of one's child." Iraheta v. Superior Court, 70 Cal. App. 4th 1500, 1509 (Ct. App. 1999).
[71] "We must balance these [*Eldridge*] elements against each other, and then set their net weight in the scales against the presumption" *Lassiter*, 452 U.S. at 27.
[72] Iraheta, 70 Cal. App. 4th at 1505 ("The court must balance the 'net weight' of the three *Eldridge* factors 'against the presumption that there is a right to appointed counsel only where the indigent, if he is unsuccessful, may lose his personal freedom.'") (quoting *Lassiter*, 452 U.S. at 27).
[73] *In re* Jay R., 150 Cal. App. 3d 251, 265 (Ct. App. 1983) (finding a right to counsel because severance of the parent-child relationship amounts to a taking of liberty).
[74] Salas v. Cortez, 24 Cal. 3d 22, 33 (1979) (finding a right to counsel in a paternity hearing because the state has "the state has no legitimate interest incorrectly ascribing parentage and imposing the obligations of fatherhood on someone other than the child's actual father. Appointment of counsel for indigent defendants will make the fact-finding process in paternity cases more accurate, thereby furthering the state's legitimate interests in securing support for dependent children.").
[75] Application of Gault, 387 U.S. 1, 39 (1967) (finding that a juvenile who faces charges of delinquency has a right to counsel because the juvenile's right to freedom and the parent's right to custody are at stake).
[76] Gagon v. Scarpelli, 411 US 778, 790 (1973) (finding the right to counsel in parole revocation proceedings on a case by case basis).

courts have also expressly declined to recognize a right to counsel in other civil situations, such as civil forfeiture proceedings[78] and civil gang injunctions.[79] Specifically, the California case *Iraheta v. Superior Court* determined that there is generally no right to court-appointed counsel in a civil gang injunction action.[80]

A. THE PRESUMPTION AGAINST COUNSEL IN CIVIL CASES

In determining whether the right to counsel attaches in the civil context, it is necessary to first determine whether the *Lassiter* presumption against counsel exists for that particular kind of civil proceeding. The *Lassiter* presumption against counsel exists so long as the impending action does not threaten to deprive one of "physical liberty."[81] Unfortunately, the Court in *Lassiter* never explicitly defined what constitutes a "deprivation of physical liberty."[82] Nevertheless, it is settled that a proceeding that directly imposes a danger of imprisonment or institutionalization upon an individual counts as a deprivation of physical liberty.[83] The *Iraheta* court noted that criminal proceedings, and thus incarceration, are merely a future possibility for those who are

---

[77] County of Santa Clara v. Superior Court, 2 Cal. App. 4th 1686, 1697 (Ct. App. 1992) (finding that to hold an indigent defendant in contempt for failing to pay child support was criminal in nature and required the appointment of counsel).

[78] People v. $30,000 U.S. Currency, 35 Cal. App. 4th 936, 944 (Ct. App. 1995) (finding no right to appointed counsel because, among other factors, defendant did not face incarceration). *But see* State v. $1,010.00 in Am. Currency, 722 N.W. 2d 92, 99 (S.D. 2006) (finding a right to counsel because petitioner faced the loss of an important property interest).

[79] Iraheta v. Superior Court, 70 Cal. App. 4th 1500, 1514-1515 (Ct. App. 1999).

[80] *Id.*

[81] Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 31 (1981).

[82] Michael Milleman, *The State of Due Process Justification For a Right to Counsel in Some Civil Cases*, 15 TEMP. POL. & CIV. RTS. L. REV. 733 (2006) (recognizing that the Court only left "cryptic clues" about the showing necessary to overcome the preumption).

[83] Scott v. Illinois, 440 U.S. 367, 373 (1979) (stating that premise that "actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment . . . is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel"); People v. $30,000 U.S. Currency, 35 Cal. App. 4th 936, 944 (Ct. App. 1995) (finding that no right to counsel because "[u]nlike the situation in Salas, in which the defendant faced incarceration and other serious consequences from an adverse judgment, here, defendant's interest also is merely financial."); Reno v. Flores, 507 U.S. 292, 315-316 (1993) (O'Connor, J., concurring) (stating that "restraining the individual's freedom to act on his own behalf-through incarceration, institutionalization, or other similar restraint of personal liberty . . . [is a] 'deprivation of liberty") (citations omitted).

targeted by a civil gang injunction.[84] That is, before an individual faces incarceration via a civil gang injunction, he or she must first litigate the civil gang injunction action, lose, violate the injunction, and then have a criminal action brought under section 166 of the California Penal Code.[85] The *Iraheta* court then noted that inherent but not immediate danger of criminal liability also existed in *Lassiter*, and yet, the U.S. Supreme Court determined that there was a presumption against counsel.[86] Thus, in light of the *Lassiter* Court's treatment of future incarceration, the *Iraheta* court concluded that the future possibility of criminal action was not enough to dispel the *Lassiter* presumption.[87]

The additional consideration of family members being enjoined does not change this analysis. In particular, the fact that family members are being enjoined from meeting in public does not bring the immediacy of imprisonment or institutionalization any closer

[84] *Iraheta*, 70 Cal. App. 4th at 1510 ("The possibility that defendant would suffer the loss of his physical liberty, while a factor, was not a determinative factor."). The severity of liability inherent in violating a civil gang injunction did not seem to be fully appreciated in the *Iraheta* court's opinion. As noted by Mathew Werdegar in *Enjoining the Constitution*, 51 STAN. L. REV. 409, 437 (1999) examples of incarceration following a gang injunction can be seen where "a 16-year-old youth banned in a gang injunction [in] Oceanside, California, was sentenced to 240 days in a juvenile detention camp for publicly associating with another defendant." *But cf.* Application of Gault, 387 U.S. 1, 61 (1967) (finding a right to counsel in a civil proceeding where petitioner was facing six years of confinement in lieu of a $50-$100 fine).
[85] *Iraheta*, 70 Cal. App. 4th at 1509-11.
[86] *Id.* at 1511 n.4.
[87] "The possibility that defendant would suffer the loss of his physical liberty, while a factor, was not a determinative factor." *Id.* at 1510.

upon a defendant than it would otherwise.[88] Thus, even considering family interference, there is probably a presumption against counsel in civil gang injunction cases.[89]

B. INTERFERENCE WITH THE FAMILY AND OVERCOMING THE PRESUMPTION AGAINST COUNSEL

After determining that there is a presumption against counsel, the *Iraheta* court then held that in order to outweigh the *Lassiter* presumption, "petitioners must establish that these civil proceedings may deprive them of an interest that is as fundamental as a right to physical liberty or as paramount as the right to the care, custody and management of one's child."[90] This is where a civil gang injunction's interference with the family takes on its significance. If it can be established that interference with family relationships deprives one of a personal interest that is as fundamental as the care and custody of one's child, then the presumption could be overcome.[91]

---

[88] There is an argument to be made that one may become a sort of virtual prisoner in public by enduring the humiliation of not being able to meet his or her family members as they choose. A broad reading of cases like Moore v. City of E. Cleveland, 431 U.S. 494, 499, 502 (1977) (finding a due process violation when the government seeks to interfere with the family through a housing ordinance) could yield the argument that because a due process violation means there has been a deprivation of life, liberty, or property a due process violation means that there is a per se "deprivation of a personal liberty." Although I sympathize with this argument, it is somewhat attenuated; the legal term "deprivation of personal liberty" is unique and is very rarely used by the U.S. and California Supreme Courts. Because of this limited use, it is likely that the term has some special meaning apart (although not discontinuous) from liberty as associated with due process generally.

[89] In the context of the right to counsel in civil cases, it should be noted that it is unclear if the California Supreme Court has found broader authority under the California Constitution that does not impose a presumption against counsel. Petition for Review at 9, Iraheta v. Superior Court, 70 Cal. App. 4th 1500 (1999) (No. S078658); People v. Iraheta, 70 Cal. App. 4th 1500, 1507 (1999) ("Petitioners urge this court to disregard the general rule and thus to ignore the second prong of the Lassiter test"). For example, the California Supreme Court, referring to the U.S. Supreme Court decision in *Scott v. Illinois*, a case that did not find for the appointment of counsel, explained "Scott is not the law in California." Salas v. Cortez, 24 Cal.3d 22, 27 n.2 (1979); Petition for Review at 9, Superior Court, 70 Cal. App. 4th 1500 (1999). Also the later case of *In re Jay R.* finds for the right to counsel in a paternity hearing very similar to the situation in *Lassiter* where the U.S. Supreme Court did not find such a right. *In re* Jay R., 150 Cal. App. 3d 251, 265 (Ct. App. 1983). Whether or not the California courts have distinguished their state constitutional due process requirements from the U.S. Constitution, the nature of the rights involved in civil gang injunctions that interfere with familial relationships is such that it should demand the right to counsel.

[90] *Iraheta*, 70 Cal. App. 4th at 1509; *see also* County of Orange v. Dabs, 29 Cal. App. 4th 999, 1004 (Ct. App. 1994) (finding a right to counsel for defendant "[e]ven if he cannot be jailed ").

[91] *Iraheta*, 70 Cal. App. 4th at 1509.

Regarding the first *Eldridge* factor, the private interests at stake, the First Amendment right to freedom of association and the Fourteenth Amendment right to due process invariably become implicated in the context of government interference with family relationships.[92] Unfortunately, for purposes of measuring the personal liberty at stake, the *Iraheta* court refused to recognize that any First Amendment rights were being threatened because of the California Supreme Court's holding in *Acuna*.[93] The *Acuna* court held that if a group targeted by a civil gang injunction does not exist as an "intimate" or "instrumental" organization, then First Amendment protections do not apply.[94] The defendant in *Acuna* did not meet this standard because protection under "the First Amendment, 'does not extend to joining with others for the purpose of depriving third parties of their lawful rights.'"[95] Thus under *Acuna* a civil gang injunction does not infringe upon any First Amendment rights.[96]

One problem with this approach is that under the *Eldridge* test, the private interests at stake are the "potential" injuries a defendant faces.[97] While the *Acuna* court may have ruled that the right to assembly has no meaning with regard to gang members who gather to deprive "third parties of their lawful rights," it is possible to imagine situations where some of the individuals targeted by a civil gang injunction do share a

---

[92] "The Supreme Court has found that the Constitution protects the family in general." Barbara Jones, *Do Siblings Possess Constitutional Rights?*, 78 CORNELL L. REV. 1187, 1196 (1993); *see also* Roberts v. United States Jaycees, 468 U.S. 609, 618-19 (1984) ("… the Bill of rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships … relationships that might be entitled to this sort of constitutional protection, are those that attend the creation and sustenance of a family-marriage.").
[93] *Iraheta*, Cal. App. 4th at 1511.
[94] People *ex rel.* Gallo v. Acuna, 14 Cal. 4th 1090, 1110-12 (1997).
[95] *Id.* at 1112. (quoting Madsen v. Women's Health Ctr., 512 U.S. 753, 776 (1994).)
[96] *Id.* ("[T]he 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 Racksprings is one that commands protection under the First Amendment." (quoting N.Y. State Club Assn. v. N.Y. City 487 U.S. 1, 13 (1988) emphasis added).
[97] Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 31 (1981); Mathews v. Eldridge, 424 U.S. 319, 340 (1976).

protected relationship.[98] The case of family members being enjoined from meeting in public presents such a scenario.[99]

The U.S. 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."[100] Because of this special relationship the Supreme Court has determined that "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."[101] Thus, because family relationships are properly defined as "intimate," they are properly entitled to First Amendment protection of association.

The U.S. Supreme Court has not stopped at the First Amendment and has gone on to recognize that the Constitution also provides the family protections from governmental interference under the Due Process Clause of the Fourteenth Amendment.[102] For example, in *Moore v. City of East Cleveland*, the Supreme Court found that an ordinance prohibiting a grandmother and her two grandsons, who were first cousins, from living together was unconstitutional.[103] Specifically, the court found that "freedom of personal

---

[98] *Acuna*, 14 Cal. 4th at1112; *see also* Roberts v. United States Jaycees, 468 U.S. 609 (1984).
[99] Iraheta v. Superior Court, 70 Cal. App. 4th 1500, 1509 (1999) ("[T]he Fourteenth Amendment protects against a State's interferences with . . . family relationships . . . as well as with an individual's bodily integrity.") (quoting Armendariz v. Penman, 75 F.3d 1311, 1319 (9th Cir. 1996).); Roberts, 468 U.S. at 619-20 "[T]he Fourteenth Amendment protects against a State's interferences with personal decisions relating to . . . family relationships.").
[100] Roberts v. United States Jaycees, 468 U.S. 609, 619-20 (1984).
[101] *Id.* at 620.
[102] *Roberts v. United States Jaycees*, 468 U.S. at 619-620; Moore v. City of E. Cleveland, 431 U.S. 494, 503, (1977); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-640 (1974).
[103] Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977).

choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."[104] Thus, based upon *Moore v. City of East Cleveland* and similar holdings, the Constitution provides general protection when the government attempts to interfere with the family.[105]

Therefore, not only is association with the family properly defined as intimate and protected by the First Amendment[106] but the family enjoys additional substantive rights under the Due Process clause of the Fourteenth Amendment.[107] Because the Constitution provides these two deep-rooted substantive rights to the family,[108] consideration of them should be more important when courts evaluate the private interests at stake with the *Eldridge* test.[109] Thus, the procedural protection of court-appointed counsel is necessary to assure that these substantive rights are appropriately honored.[110]

Moreover, it should also be noted that injunctions, such as those against Mr. Iraheta and Mr. Buitrago, prove that the possibility of family members being prohibited from meeting in public as they choose is not merely an academic exercise. In 1999 Mr. Iraheta was enjoined from meeting with his twin brother within a specified zone, and in

---

[104] *Moore*, 431 U.S. at 499-500. (quoting Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-640 (1974).) The court in *Moore* also found that the ordinance in question had a "tenuous relation to [the] alleviation" of the overcrowding at which the ordinance was aimed.
[105] *Roberts*, 468 U.S. at 619-40; *Moore*, 431 U.S. at 498-99; *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. at 632.
[106] *Roberts*, 468 U.S. at 619-20.
[107] *Moore*, 431 U.S. at 498-99.
[108] *Moore*, 431 U.S. at 503 ("Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition").
[109] *See* Iraheta v. Superior Court, 70 Cal. App. 4th 1500, 1509 (1999).
[110] *See* 35A C.J.S. *Federal Civil Procedure* § 8 (West 2008). As a general proposition the rules of civil procedure exist to afford individuals a just, speedy, and inexpensive determination of actions. Since "our adversary system presupposes, accurate and just results are most likely to be obtained through the equal contest of opposed interest" protecting substantive rights with court appointed counsel will assure that a "just" result is reached. Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 28 (1981).

2007 Mr. Buitrago faced a suit to prevent him from meeting with his cousin in his home neighborhood.[111]

C. FAMILY RELATIONSHIPS AS ENTITLED TO CONSTITUTIONAL PROTECTION

Recognizing that family relationships are entitled to additional safeguards naturally raises the question: what kinds of relationships are encompassed by the term "family"? Although the U.S. Supreme Court has found general rights for the family under the Constitution, it has not addressed whether such fundamental rights extend to specific family relationships such as those between siblings or cousins.[112] However, in *Smith v. Organization of Foster Families*, the Court applied a test to determine what constitutes a family relationship.[113] In *Smith* three factors were considered to determine if a family relationship existed: 1) the existence of a biological relationship, 2) the existence of emotional attachments, and 3) whether the relationship exists apart from the power of the state.[114] Thus, whether two siblings or cousins are "family," and are entitled to the generally recognized rights as a family, seems simple enough under the *Smith* test.[115]

Siblings and cousins are very often linked both biologically and emotionally and these links are usually created without the benefit of the state. When examining relationships where the biological link between two family members is more attenuated, such as that between cousins, an examination of the emotional attachments between the

---

[111] Petition for Review, at 14, Iraheta v. Superior Court, 70 Cal. App. 4th 1500 (1999); Expert Declaration, at 49, People v. Norteno, No. CGC 07-464492 (San Francisco Super. Ct. June 21, 2007).
[112] Barbara Jones, *Do Siblings Possess Constitutional Rights?*, 78 CORNELL L. REV. 1187, 1195 (1993). ("Although the Supreme Court has not specifically addressed the question of siblings' rights to maintain contact with each other, it has addressed issues relating to the fundamental rights of the family. The Supreme Court has found that the Constitution protects the family in general . . .").
[113] Barbara Jones, *Do Siblings Possess Constitutional Rights?*, 78 CORNELL L. REV. 1187, 1195 (1993); *see* Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 842-47 (1977).
[114] *Smith*, 431 U.S. 816, 843-46 (1977).
[115] Barbara Jones *Do Siblings Possess Constitutional Rights?*78 CORNELL L. REV. 1187, 1208 (1993).

family members can alleviate concerns that the assignment of constitutional protection is contrived. For instance, in the case of Mr. Buitrago and his cousin, facts that the two refer to one another as "brother" and that they share the interrelated nicknames of "Fat Tone" and "Little Tone" demonstrate the existence of such close emotional attachments creating an authentic family relationship.[116] Thus, the determination of whether siblings or cousins may properly be considered family as defined by *Smith* is a factual question to be determined on a case-by-case basis.[117]

In interpreting these U.S. Supreme Court cases, some lower federal courts have explicitly granted constitutional protections to relationships like those shared by siblings.[118] In contrast, at least one lower federal court has declined to extend such protections.[119] Much like the lower federal courts, state courts are split on whether to acknowledge the rights of siblings.[120]

---

[116] Opposition to Application for OSC, Exhibit A at 2, People v. Norteno, No. CGC 07-464492, (San Francisco Super. Ct. Sept. 5, 2007).

[117] Barbara Jones, *Do Siblings Possess Constitutional Rights?*, 78 CORNELL L. REV. 1187 (1993).

[118] *See, e.g.*, Aristotle P. v. Johnson, 721 F. Supp. 1002, 1011 (N.D. Ill. 1989) (denying defendants' motion to dismiss in light of the growing body of decisional law articulating the associational rights of siblings); *see also* County of Fulton v. Whalen, No. 94-540, 1994 WL 16100063 (U.S. Nov. 23, 1994).

[119] Russ v. Watts, 414 F.3d 783, 790 (7th Cir. 2005) (finding that the governmental action was not purposeful); *see also* B.H. v. Johnson, 715 F. Supp 1387, 1399-1400 (N.D. Ill 1989) (finding that after children had been legally and legitimately separated there was no due process right to visitation). These cases can be read as building upon the U.S. Supreme Court's statement that "[h]istorically, this guarantee of due process has been applied to deliberate decisions of government officials to deprive a person of life, liberty, or property" rather than being applied to decisions denying the associational rights of siblings. Daniels v. Williams, 474 U.S. 327, 331 (1986). Here, because civil gang injunctions are an intentional state action which interferes with a familial relationship, such a predication would be difficult to make. *But see* Ken R. v. Arthur Z., 682 A.2d 1267, 1271 (Pa. 1996) (finding no constitutional right for siblings to associate generally).

[120] *Compare* L v. G., 497 A.2d 215, 221 (N.J. Super. Ct. Ch. Div. 1985) (adult sibling had right to visit with minor sibling over objections of father and stepmother) *with* Ken R. v. Arthur Z., 682 A.2d 1267, 1271 (Pa. 1996) (although recognizing the "well established" importance of a sibling relationship which creates an interest greater than the average citizenry, finding no constitutional right).

In California rights between siblings have been established but are not all-encompassing.[121] Much of the advances of sibling associational rights have occurred in the context of child custody proceedings where children face being split up.[122] Under California statutory law, child custody proceedings are determined in accordance with the "best interest" of the child.[123] Thus, in such proceedings the associational rights of the children are considered under a statutory mandate to achieve this end, and the greater constitutional issues involved are rarely addressed directly.[124]

This reluctance to address the constitutional issues probably stems from the U.S. Supreme Court's mandate to avoid constitutional issues and a fear of conflicting constitutional rights. The U.S. Supreme Court has stated that lower courts should "avoid constitutional issues when resolution of such issues is not necessary for [the] disposition of a case."[125] Because child custody hearings can be predicated upon the statutory mandate of the "best interest" of the child, the resolution of constitutional issues is not

---

[121] *See In re* Marriage of Williams, 88 Cal. App. 4th 808, 814 (Ct. App. 2001) (finding that "[c]hildren are not community property to be divided equally for the benefit of their parents . . . [a]t a minimum, the children have a right to the society and companionship of their siblings."). *But see In re* Gerald J., 1 Cal. App. 4th 1180, 1187 (Ct. App. 1991) (finding that "the juvenile court law expresses no affirmative duty to keep siblings together").

[122] *In re* Marriage of Williams, 88 Cal. App.4th 808, 814 (Ct. App. 2001).

[123] CAL. FAM. CODE § 3120 (West 2004) ("[T]he husband or wife may bring an action for the exclusive custody of the children of the marriage. The court may, during the pendency of the action, or at the final hearing thereof, or afterwards, make such order regarding the support, care, custody, education, and control of the children of the marriage as may be just and in accordance with the natural rights of the parents and the best interest of the children.").

[124] *In re* Luke, 107 Cal. App. 4th 1412, 1424 (Ct. App. 2003) (refusing to address the idea of associational rights in a constitutional sense, foreseeing a conflict between parental due process rights over siblings; "our decision is a narrow one and we express no opinion regarding the relative importance of sibling relationships and the right to parent."); *see also* William Wesley Patton, *The Status of Siblings' Rights: A View Into the New Millennium*, 51 DEPAUL L. REV. 1, 38 (2001) (concluding in part that "courts have seldom agreed to address the issue [of sibling's associational rights]"). *Contra In re* Marriage of Heath, 122 Cal. App. 4th 444, 449 (Ct. App. 2004) (stating that siblings have a "right to the society and companionship of their siblings.").

[125] *See In re* Snyder, 472 U.S. 634, 642 (1985) ("We avoid constitutional issues when resolution of such issues is not necessary for disposition of a case.").

necessary for such actions.[126] In contrast, civil gang injunctions targeting family relationships provide a situation where constitutional recognition of such issues can no longer be avoided.

There is also some concern that by directly addressing these constitutional issues and recognizing additional familial rights, such as that between siblings or cousins, the courts will create a conflict between these newly recognized rights and the right of a parent to have custody over their children.[127] The fear is that such a conflict would put the courts in the awkward position of valuing these competing fundamental rights between parents, cousins, and siblings.[128] However, such fears are misplaced because such a conflict of interests can still be resolved under the "best interest" of the child standard in situations of child custody.[129] Moreover, as encouragement that such a constitutional interpretation is warranted, recent California decisions have indicated that there is a broader public policy for the state of California to acknowledge the rights of siblings to associate.[130] Because civil gang injunctions involve a scenario where there is no controlling statute to protect family members, broader family rights, such as those between siblings to associate, should and can now be directly addressed.

---

[126] *See In re* Marriage of Heath, 122 Cal. App. 4th 444, 449-450 (Ct. App. 2004) (overturning trial court's decision to split siblings up, as it was not in the best interests of the children); *see also Luke*, 107 Cal. App. 4th at 1420-23 (basing the placement of siblings upon CAL. WELF. & INST. CODE §§ 358.1, 16002 (West 2003)).

[127] Francis McCarthy, *The Confused Constitutional Status And Meaning of Paternal Rights*, 22 GA. L REV. 975, 1006 (1988) ("[W]henever there are conflicts between . . . parents and their children . . . framing all of the contending positions in terms of family rights will only confound any constitutional analysis and serve to negate any claims of rights.").

[128] Barbara Jones, *Do Siblings Possess Constitutional Rights?*, 78 CORNELL L. REV. 1187, 1215-20 (1993).

[129] *Id*.

[130] *See, e.g., In re* Marriage of Williams, 88 Cal. App.4th 808, 814 (Ct. App. 2001) ("At a minimum, the children have a right to the society and companionship of their siblings."); *see also In re Marriage of Heath*, 122 Cal. App. 4th at 450 ("[I]t is the policy of this state that siblings should be allowed to grow up together . . . .").

The Supreme Court has stated "[o]ur decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition."[131] In light of such language, the kind of private interests at stake in gang injunctions, like the ones faced by Mr. Buitrago and Mr. Iraheta, are significant beyond what was considered in *Iraheta*.[132] Not only does the *Iraheta* court's analysis not address the private interests at stake in the proper context of a potential deprivation as demanded by both the *Eldridge* and *Lassiter* tests,[133] but the court also does not address the deprivation of familial rights even though it was an issue before the court.[134] In viewing the family relationship, it is apparent that this is a deeply rooted and intimate interest that the Constitution protects from governmental interference.[135] Because family relationships are the kind of interests that the U.S. Supreme Court has deemed deserving of protection, the potential interference with family relationships should overcome the presumption against counsel.[136] Moreover, even if the threat to this interest is not enough to overcome the presumption against the right to counsel, it should at least result in a very strong showing under the private interests prong

[131] Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977).
[132] The word "family" appears only once in the opinion, when the court states: "the Fourteenth Amendment protects against a State's interferences with . . . family relationships." Iraheta v. Superior Court, 70 Cal. App. 4th 1500, 1509 (Ct. App. 1999). The words "brother," "twin" and "sibling" do not appear anywhere in the opinion.
[133] Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 27 (1981); Mathews v. Eldridge, 424 U.S. 319, 340 (1976).
[134] The *Iraheta* court does say that the "Fourteenth Amendment protects against a State's interferences with . . . family relationships." *Iraheta*, 70 Cal. App. 4th at 1509. However, it does not address whether Mr. Iraheta has such a threatened relationship.
[135] *Moore*, 431 U.S. at 503 ("[T]he institution of the family is deeply rooted in this Nation's history."); *see* Washington v. Glucksberg, 521 U.S. 702, 726 (1997) ("[F]amily relationships . . . involv[e] the most intimate and personal choices a person may make in a lifetime.").
[136] *See In re* Jay R., 150 Cal. App. 3d 251 (Ct. App. 1983) (finding a right to counsel because severance of the parent-child relationship amounts to a taking of liberty). *Contra* Washington v. Glucksberg, 521 U.S. 702, 727 (1997) (finding that "many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected . . .").

of the *Eldridge* test, which, coupled with a renewed analysis under the other two prongs of the test, should overcome the presumption against counsel. [137]

III. THE GOVERNMENT'S INTEREST AND THE RISK OF AN ERRONEOUS DEPRIVATION IN LIGHT OF FAMILY RELATIONSHIPS

The need for the right to counsel is further strengthened with a reconsideration of the governmental interests and the risks of an erroneous decision involved in gang injunctions that threaten to interfere with family relationships. Analysis of the governmental interests involved reveals that the government has a general interest in refraining from interference with the family whenever possible.[138] Moreover, even when such interference with the family is warranted, the government nevertheless has a very strong interest in assuring that such interference is not wrongful.[139] Because wrongful interference can best be avoided by the appointment of counsel, its use is warranted.

Further, analysis of the risk of an erroneous decision as conceptualized by the *Iraheta* court will reveal the following: 1) civil gang injunctions that interfere with family relationships affect the kinds "private affairs" that warrant a redistribution of resources to appoint counsel; and 2) the solution the *Iraheta* court envisions to deal with complex litigation is itself complex, inefficient, and unfair.

A. THE GOVERNMENT'S INTERESTS

The U.S. Supreme Court has noted that when dealing with matters of the family, it "must examine carefully the importance of the governmental interests advanced and the

[137] This comment is not proposing that civil gang injunctions should not be able to target family members. Family members do commit crimes together. When family members do commit crimes together and share in a criminal relationship -- such as gang membership -- that relationship should be subject to the same constraints as any other criminal relationship.
[138] *See Moore*, 431 U.S. at 499.
[139] *Id*.

extent to which they are served by the challenged regulation."[140] Thus far, such language has been viewed in the context of understanding the familial relationship as a private interest.[141] However, implicit within such language is also the notion that the government itself must value the familial interest at stake.[142] That is, because the Constitution provides protections to the family from government interference,[143] and the government is bound by the Constitution,[144] so then must the government have some interest in refraining from interfering with the family.[145]

At the same time, however, the Supreme Court has also stated "[o]f course, the family is not beyond regulation."[146] The Supreme Court has found, for example, that in "[a]cting to guard the general interest" the state may interfere with a parent's right to control the actions of their children in such matters as child labor and school attendance.[147] Similarly, if family members are fellow gang members, then the state may also have justification for acting in the general interest to stop their criminal activities, for "[t]o hold that the liberty of . . . peaceful, industrious residents . . . must be forfeited to preserve the illusion of freedom for those whose ill conduct is deleterious to the

---

[140] *Id.* A distinction can be made from this quote, however, as it was concerned with "choices concerning family living arrangements," not family associational rights.
[141] "A host of cases . . . have consistently acknowledged a 'private realm of family life which the state cannot enter.'" *Id.*
[142] If the court must examine "the importance of the governmental interests advanced" and see if that interest is worth the disruption of the family, some governmental interests must be less than the importance of the family. Thus, a family free from governmental regulation is a governmental interest.
[143] Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-40 (1974) ("This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."); *see also* Roberts v. United States Jaycees, 468 U.S. 609, 619-620 (1984).
[144] U.S. Const. art. VI, § 1, cl. 2 ("This Constitution . . . shall be the supreme Law of the Land.").
[145] Moore, 431 U.S. at 499.
[146] *Id.*
[147] Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (finding an aunt could not employ her minor niece to sell magazines despite any religious imperative to do so); Sturges & Burn Mfg. Co. v. Beauchamp, 231 U.S. 320, 325-326 (1913) (finding that a prohibition of children under 16 years from employment in hazardous occupations does not amount to a taking of liberty or property without due process of law); State v. Bailey, 61 N.E. 730, 732 (Ind. 1901) (finding that prosecution of a parent for refusal to comply with state statute requiring compulsory education for minor was proper).

community as a whole is to ignore half the political promise of the Constitution and the whole of its sense."[148]

Thus, in situations where a conflict has arisen between the government's duty to refrain from interference with the family and its desire to impose a regulation upon the family, the U.S. Supreme Court's statement that it must "examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation" takes on a new meaning: how to balance these competing interests?[149] In trying to ascertain how to balance these interests, an increasingly important question for the government is whether those family members targeted by a civil gang injunction are actually gang members. If they are, then the hope of bringing order to a community facing violence and intimidation in its streets by preventing those family members from meeting together may justify interference with a family relationship.[150] However, if they are not gang members, then not only is the government working counter to its own interest in protecting the family, but the government is at the same time wasting resources in bringing and enforcing a suit that stands no chance to hinder gang activity.[151]

---

[148] People *ex rel.* Gallo v. Acuna, 14 Cal. 4th 1090, 1125 (1997); State v. Gaynor, 197 A. 360, 361 (1938) (finding that the 1934 "Gangster Act" was a valid use of legislative authority since public policy demands that organized groups that "wage war" upon society be abolished). *Contra* Houston v. Hill, 482 U.S. 451, 471-72 (1967) (finding that the First Amendment invalidates a statute forbidding verbal criticism of officers: "We are *472 mindful that the preservation of liberty depends in part upon the maintenance of social order . . . [but] a certain amount of expressive disorder not only is inevitable in a society committed to individual freedom, but must itself be protected if that freedom would survive.").

[149] *Moore*, 431 U.S. at 499.

[150] West Virginia v. U.S., 479 U.S. 305, 312 (1987) ("[W]hile courts must show 'solicitude for state interests, particularly in the field of family and family-property arrangements,' these interests may be overridden to avoid injury to "clear and substantial interests of the National Government.") (quoting United States v. Yazell, 382 U.S. 341, 352 (1966)). The term "may" is used in this context because it is not conclusive that civil gang injunctions work. *See* Cheryl L. Maxson *It's Getting Crazy Out There: Can a Civil Gang Injunction Change a Community?*, 4 CRIMINOLOGY & PUB. POL'Y 577, (2005).

[151] "What possible interest can the Government have in preventing members of a family from dining as they choose? It is simply none of the Government's business." Lyng v. Castillo, 477 U.S. 635, 645 (1986)

"[O]ur adversary system presupposes [that] accurate and just results are most likely to be obtained through the equal contest of opposed interests."[152] Indigent defendants who, like Mr. Buitrago, do not have a GED, stand little chance defending themselves against such a suit on their own.[153] Accordingly, a suit for an injunction could likely succeed in prohibiting family members from associating with one another whether or not they share a criminal relationship.[154] Thus, because the Constitution makes the family the government's interest, and the government has an interest in not wasting legal resources against those who are not gang members, there is a strong governmental interest that counsel be provided to family members who are threatened by a civil gang injunction.[155]

(Marshall, J., dissenting) (opining that there is no government interest in defining "household" for purposes of food stamp allotment because of interference with the family). It is interesting to note, in reference to this quote, that by imposing a civil gang injunction on family members the state will actually be prohibiting them from dinning "as they choose," since enjoined family members would not be able to dine together in public. *See also* Stutson v. United States, 516 U.S. 193, 197 (1996) (Recognizing that "[j]udicial efficiency . . . [is an] important value").

[152] Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 28 (1981); County of Orange v. Dabs, 29 Cal. App. 4th 999, 1004 (Ct. App. 1994) (finding "appointed counsel is necessary to assure a 'level playing field.' This is particularly so in the unique situation where the state has elected to represent one private citizen against another.").

[153] *In re* Jay R., 150 Cal. App. 3d 251, 263 (Ct. App. 1983) ("An uneducated indigent can easily become overwhelmed by such a proceeding without the assistance of counsel."); Opposition to Application for OSC, at 14, People v. Norteno, No. CGC 07-464492 (San Francisco Super. Ct. Sept. 5, 2007).

[154] Salas v. Cortez, 24 Cal. 3d 22, 31 (1979) ("A judgment rendered in this manner [without counsel] is not only unfair, it is unreliable.").

[155] For a similarly formulated argument that views the private interest at stake as being a kind of governmental interest in order to find a right to counsel, *see Salas*, 24 Cal. 3d at 33. In *Salas*, the court noted "the state has no legitimate interest incorrectly ascribing parentage and imposing the obligations of fatherhood on someone other than the child's actual father." *Id.* Also, because this governmental interest is premised upon litigation not reaching the truth of the matter, this governmental interest is then also dependent upon the risk of an erroneous decision. In understanding that the risk of an erroneous decision and the personal interests at stake come together at a nexus, which is the government's interest, only then can one also appreciate the danger in trying to fully isolate anyone prong of the *Eldridge* test. Indeed, the *Iraheta* court in considering the argument that "the state has no interest in erroneously branding a person as a gang member" attempts such an isolation of each interest. Specifically, the *Iraheta* court stated that "[p]etitioners, however, confuse Lassiter's second factor (the government's interest) with Lassiter's third factor (the risk that the procedures used will lead to erroneous decisions)." Iraheta v. Superior Court, 70 Cal. App. 4th 1500, 1511 (Ct. App. 1999). In attempting to artificially isolate these interests where they are necessarily intertwined, the *Iraheta* court failed to analyze their weight properly.

B. THE RISKS OF AN ERRONEOUS DEPRIVATION

These concerns surrounding the personal and governmental interests at stake are increased by the risk of an erroneous decision in a civil gang injunction case. However, the *Iraheta* court specifically weighed such a risk of error and found it to be of minimal weight.[156] The *Iraheta* court considered two arguments as to the risk of an erroneous decision: the imbalance of resources and the complexity of the issues involved.[157] The court rejected both of these arguments, explaining an imbalance of resources is simply a "fact of life"[158] and the complexity required to appoint counsel is the need for experts, a need the court did not find in *Iraheta*.[159] However, careful examination of these arguments reveals just how great the risk of an erroneous decision is.[160]

1. THE IMBALANCE OF RESOURCES

The *Iraheta* court initially acknowledged that Mr. Iraheta was opposed by the "full resources of the state," a phrase taken from *Salas v. Cortez*, a case in which the court found a right to appointed counsel in a civil setting.[161] However, the *Iraheta* court did not attribute much strength to this argument and instead relied on the dissent in *Salas*, which stated: "It is an undeniable fact of life that in many civil suits the parties are

---

[156] *Iraheta*, 70 Cal. App. 4th at 1514 ("This is not a complex legal issue.").
[157] *Iraheta*, 70 Cal. App. 4th at 1512-14; *see also* Petition for Review at 18-21, Iraheta v. Superior Court, No. S078658 (Cal. Mar. 31, 1999), 1999 WL 33746242.
[158] *Iraheta*, 70 Cal. App. 4th at 1513 (quoting dissent *Salas* 24 Cal. 3d at 37).
[159] *Id*. at 1514.
[160] On the other hand, the *Iraheta* court's determination that imbalance of resources is not a "decisive factor" is an appropriate distinction to make, as the courts "must balance these elements against one another." *See* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 27 (1981). However, this language seems to echo earlier language in the opinion when the court stated that "[t]he possibility that defendant would suffer the loss of his physical liberty, while a factor, was not a determinative factor." *Iraheta*, 70 Cal. App. 4th at 1510. While this is true, the finding of multiple factors that are "not determinative" seems to indicate that, even without the consideration of family interests, civil gang injunctions generally have some of the qualities that the appointment of counsel calls for.
[161] Salas v Cortez, 24 Cal. 3d 22, 30 (1979).

unequally matched in terms of legal representation . . . ."[162] The *Iraheta* court then went on to cite a distinction made in *Clark v. County of Orange*: "clearly, imbalance [of resources] cannot be a decisive factor, as it is the rare case where the state does not have greater resources than a private party in any sort of litigation."[163] This line of argument does not seem to disagree with the proposition that those targeted by civil gang injunctions are at a distinct disadvantage and that this may result in an erroneous decision, but rather contends that life is tough, many litigants are often at a distinct disadvantage, and the court's job is not to "equalize all such legal conflicts."[164]

The *Iraheta* court went on to say that of all of those who are at a distinct disadvantage, it is the "private affair" targeted by the government that deserves the protections of counsel in a civil case, and since civil gang injunctions operate under a public nuisance claim, the action concerns the public at large, not private parties.[165] However, if the court had addressed the issue that Mr. Iraheta was being enjoined from seeing his twin brother, it would most likely have found such a "private affair" as being threatened. The *Iraheta* court itself stated that there is "private affair between a mother and the man she named as the father of her child" and that "the Fourteenth Amendment protects against a State's interferences with . . . family relationships . . . [as this area] represent[s] a 'realm of personal liberty which the government may not enter.'"[166] Thus, in raising the issue of family relationships as being threatened by civil gang injunctions,

[162] *Iraheta*, 70 Cal. App. 4th at 1513.
[163] *Iraheta*, 70 Cal. App. 4th at 1513; Clark v. County of Orange, 62 Cal. App. 4th 576, 591 (Ct. App. 1998).
[164] *Iraheta*, 70 Cal. App. 4th at 1513.
[165] *Id*.
[166] *Iraheta*, 70 Cal. App. 4th at 1509 (quoting Armendariz v. Penman (9th Cir. 1996).)

the *Iraheta* court's previous statement that the appointment of counsel is reserved for private affairs supports the proposition that counsel should in fact have been appointed.[167]

2. THE COMPLEXITY OF THE LITIGATION

The *Iraheta* court's discussion of why civil gang injunctions do not rise to the level of complexity that demands the appointment of counsel is perhaps the most unsettling part of the opinion. The *Iraheta* court dismisses the idea that the issues at stake in a civil gang injunction are as complex as the issues presented in *Salas*, a case that included DNA and blood group testing.[168] The court begins by noticing "[t]he only issue petitioners have identified that cannot be raised by way of subsequent collateral attack (if and when petitioners violate the preliminary injunction) is whether petitioners are gang members."[169] The *Iraheta* court then points out that by using the tool of collateral attack a defendant has the option of violating the court order, receiving court-appointed counsel in the ensuing criminal case, and then collaterally attacking all of the issues that were litigated in the civil case with the court-appointed counsel.[170] Thus, the court concludes that there is no need to consider court-appointed counsel to deal with the complexity of

[167] What counts as a "private affair," however, could be distinguished under a narrower reading of *County of Orange v. Dabbs*, 29 Cal. App. 4th 999, 1004 (Ct. App. 1994) (finding that the need for the appointment of counsel "is particularly so in the unique situation where the state has elected to represent one private citizen against another."). Using this language, one can argue that there is only interference with a "private affair" when the state is actually acting upon the interest of a single party, rather than the "entire community," as a nuisance does under CAL. CIV. CODE § 3480 (West 2008). If this is the case, then the fact that those targeted by a civil gang injunction are also family members does not matter, since this would not change that the injunction is being brought on behalf of the entire community. However, such a reading runs counter to intuition, and even the *Iraheta* court held that there is a "private affair between a mother and the man she named as the father of her child." *Iraheta*, 70 Cal. App. 4th at 1513.

[168] *Iraheta*,70 Cal. App. 4th at 1514.

[169] *Id.* A "collateral attack" is defined as "[a] n attack on a judgment in a proceeding other than a direct appeal; esp., an attempt to undermine a judgment through a judicial proceeding in which the ground of the proceeding (or a defense in the proceeding) is that the judgment is ineffective. • A petition for a writ of habeas corpus is one type of collateral attack. -- Also termed indirect attack." BLACK'S LAW DICTIONARY (8th ed. 2004).

[170] *Iraheta*, 70 Cal. App. 4th at 1514.

the original action because a defendant has a way to get court-appointed counsel to re-litigate these civil issues.[171]

The court's suggestion that a defendant may violate a court order so that he or she may obtain criminal counsel to re-litigate the civil issues involved in a gang injunction presents issues of efficiency and fairness. Issues of efficiency exist because the court is essentially acknowledging that court-appointed counsel can, and in proper circumstances should, litigate the issues that arise in civil gang injunction actions.[172] However, the path the court has laid out for a defendant to obtain appointed counsel utilizes many steps that could simply be eliminated. To demand that an indigent defendant go to a civil trial, represent himself, fail to understand the complex issues involved in the case, lose, have an injunction leveled against him, violate the injunction, face prosecution, get appointed counsel, and then re-litigate these complex issues that the court has already been over, creates significant costs to the system that could and should be avoided.[173]

---

[171] In order to mount a collateral attack upon the injunction, the *Iraheta* court suggested that a defendant could rely on CAL. CIV. PROC. CODE §§ 533 and 904.1 (West 1999). *Iraheta*, 70 Cal. App. 4th at 1514 n.6. CAL. CIV. PROC. CODE § 533 (West 1999) reads as follows: "In any action, the court may on notice modify or dissolve an injunction or temporary restraining order upon a showing that there has been a material change in the facts upon which the injunction or temporary restraining order was granted, that the law upon which the injunction or temporary restraining order was granted has changed, or that the ends of justice would be served by the modification or dissolution of the injunction or temporary restraining order." CAL. CIV. PROC. CODE § 904.1 (West 1999) reads as follows: "(a) An appeal, other than in a limited civil case, is to the court of appeal. An appeal, other than in a limited civil case, may be taken from any of the following . . . (6) From an order granting or dissolving an injunction, or refusing to grant or dissolve an injunction."

[172] *Iraheta*, 70 Cal. App. 4th at 1514 ("[T]o argue that the risk of an erroneous decision is more likely due to the complexity of the facts is also misplaced. The only issue petitioners have identified that cannot be raised by way of subsequent collateral attack (if and when petitioners violate the preliminary injunction) is whether petitioners are gang members.").

[173] *See* Stutson v. United States, 516 U.S. 193, 197 (1996) (recognizing that "Judicial efficiency . . . [is an] important value"). Moreover, "[t]he process of researching and obtaining gang injunctions is expensive, incurring between $400,000 and $500,000 in legal costs." Mathew Werdeger, *Enjoining the Constitution*, 51 STAN. L. REV. 409, 442 (1999). Earlier the *Iraheta* court stated "the People have a legitimate interest in avoiding the expense of appointed counsel and the cost of the lengthened proceedings his or her presence may cause," and "the financial ramifications could well be extraordinary." *Iraheta*, 70 Cal. App. 4th at 1511-12. By engaging the complex issues in a civil gang injunction case via this inefficient process of collateral attack, the court has implicitly relaxed its concern. While the justice system would not be paying for appointed counsel in the first proceeding, it would nonetheless be paying for the city attorney, judge,

The issue of fairness arises when the court demands that a litigant put himself or herself in the awkward position of facing criminal liability to effectively challenge a civil suit. If the *Iraheta* court is going to rely on such possible criminal liability for the full and fair adjudication of the issues, then the court should consider the appointment of counsel as though it were a criminal case. As a result, the court's earlier statement that there is no deprivation of personal liberty because the possibility of incarceration is not "directly and immediately implicated" loses its validity.[174] Because *Iraheta* sweeps these issues of complexity to the side by demanding that litigants use a procedural run-around, the court fails to properly address the complexity of the issues at stake.[175]

IV. CONCLUSION

In reconsidering civil gang injunctions and the appointment of counsel in the new light of family relationships, analysis of the *Lassiter* presumption and the weighing of each *Eldridge* factor brings forth a call for counsel. However, in the wake of the *Iraheta* decision, individuals like Mr. Buitrago are not ordinarily provided counsel and normally face a difficult situation. Unable to afford an attorney, they would have to hope for pro bono representation or face the dangerous task of self-representation.[176] If Mr. Buitrago

---

and court staff. In addition, in the second proceeding, the justice system would then have to pay for the city attorney, judge, court staff and the public defender.

[174] *Iraheta*, 70 Cal. App. 4th at 1510.

[175] The Court's solution to complexity is itself very complex; it "ignores the fact that since petitioners are not lawyers, they would not even know where to begin to engage in these options. Moreover, if petitioners violated the injunction, and were then appointed attorneys in the criminal case, it is unlikely that a successful appeal, modification, or dissolution of the injunction by the criminal defense lawyers would in any way affect the criminal contempt prosecution." Petition for Review at 18 n.5, Iraheta v. Superior Court, No. S078658, 1999 WL 33746242 (Cal. Mar. 31, 1999).

[176] 19A CAL. JUR. 3D *Criminal Law* § 109 (2001): "The following is a suggested admonition to a defendant regarding the dangers and disadvantages of self-representation: 1. Self-representation is almost always unwise and the defendant may conduct a defense to his or her own detriment; 2. Defendant will … get no help from the judge; 3. The prosecution will be represented by experienced professional counsel who will have the advantage of skill, training, education, experience and ability; and 4. Defendant will have no special library privileges, will receive no extra time for preparation and will have no staff of investigators at his or her beck and call."

did represent himself, it is doubtful that he, a man who is in the process of trying to get his GED, would be able to mount a reasonable – let alone formidable – defense against the application for injunction.[177] Perhaps certain facts would come to light, for instance, that his alleged gang related moniker, "Tone," is a family nickname given to him by his uncle when he was four[178] and that he and his cousin are respectively referred to as "Fat Tone" and "Little Tone."[179] It may also come to light that Mr. Buitrago has no criminal record.[180] On the other hand, more complex legal arguments pointing to the balance of the harm imposed by the injunction, or the possibility that any of the provisions of the injunction are void for vagueness, would most likely be out of reach for Mr. Buitrago. In the absence of all of these defensive arguments, a civil gang injunction might easily be imposed on a non-gang member.[181]

However, because Mr. Buitrago lives in San Francisco, he found himself with a bit of luck. The charter of the San Francisco Public Defender's Office includes a mandate to protect not only those who are facing prosecution, but also those facing a "danger of

[177] *In re* Jay R., 150 Cal. App. 3d 251, 263 (Ct. App. 1983) ("An uneducated indigent can easily become overwhelmed by such a proceeding without the assistance of counsel.") Also in cases where counsel is provided, it has been noted that "[a]lthough a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation . . . ." Faretta v. California, 422 U.S. 806, 835 (1975) (finding that although state may not force an attorney upon a criminal defendant, it is almost always a good idea not to represent oneself); Opposition to Application for OSC, at 14, People v. Norteno, No. CGC 07-464492 (San Francisco Super. Ct. Sept. 5, 2007).

[178] Opposition to Application for OSC, Exhibit A at 2-3, People v. Norteno, No. CGC 07-464492 (San Francisco Super. Ct. Sept. 5, 2007).

[179] Mr. Buitrago is to this day still "very heavy"; he is 5'11" tall and weighs 320 pounds. Opposition to Application for OSC, Exhibit A 2-3, People v. Norteno, No. CGC 07-464492, (San Francisco Super. Ct. Sept. 5, 2007).

[180] Opposition to Application for OSC, Exhibit A at 1, People v. Norteno, No. CGC 07-464492 (San Francisco Super. Ct. Sept. 5, 2007).

[181] *In re* Jay R., 150 Cal. App. 3d 251, 263 (Ct. App. 1983) ("An uneducated indigent can easily become overwhelmed by such a proceeding without the assistance of counsel.").

criminal prosecution."[182] Violation of the civil gang injunction subjects the individual to criminal prosecution and punishment of imprisonment for up to six months in county jail.[183] Accordingly, the San Francisco Public Defender's Office may, and did, intervene on Mr. Buitrago's behalf.[184] In fact, it is likely due to the intervention of the San Francisco Public Defender's Office that a San Francisco judge ruled on October 12, 2007, that there was not "clear and convincing evidence" that Antonio Buitrago is an active gang member, and thus he is not subject to the effects of this particular civil gang injunction.[185]

So, Mr. Buitrago is in luck; he may still see his cousin in public. In California, however, being lucky is the exception rather than the rule; in other counties in California, the Public Defender's Office does not have such a broad mandate and cannot intervene.[186] Without such a broad mandate those who face the loss of a familial

[182] San Francisco Charter § 6.104 ("The Public Defender shall, upon the request of an accused who is financially unable to employ counsel, or upon order of the Court, defend or give counsel or advice to any person charged with the commission of a crime or in danger of criminal prosecution.").
[183] CAL. PENAL CODE § 166 (2008); Opposition to Application for OSC, at 1, People v. Norteno, No. CGC 07-464492 (San Francisco Super. Ct. Sept. 5, 2007). Because imprisonment is brought within the realm of the possible, Mr. Buitrago is "in danger" of criminal liability and the San Francisco Public Defender may intervene.
[184] Opposition to Application for OSC, People v. Norteno, No. CGC 07-464492 (San Francisco Super. Ct. June 21, 2007).
[185] Demian Bulwa, *Judge Gives Norteños Strict Restrictions* at http://www.sfgate.com/cgi-bin/article.cgi?-f=/c/a/2007/10/16/BANNSQ9SI.DTL (last visited Sept. 21, 2008) (SAN FRANCISCO CHRONICLE, Oct. 16, 2007). It should be pointed out, as noted by San Francisco City Attorney Dennis Herrera, that "[t]he court didn't say (Buitrago) wasn't a gang member, but that there wasn't clear and convincing evidence that he was." *Id*.
[186] For example, Los Angeles Charter article VI, section 23, allows only for appointment when one is charged or has a reasonable appeal to make from a conviction. The section reads: "Upon request by the defendant or upon order of the court, the Public Defender shall defend, without expense to them, all persons who are not financially able to employ counsel and who are charged, in the Super. Ct., with the commission of any contempt, misdemeanor, felony or other offense. He shall also, upon request, give counsel and advice to such person in and about any charge against them upon which he is conducting the defense, and he shall prosecute all appeals to a higher court or courts, of any person who has been convicted upon any such charge, where, in his opinion, such appeal will, or might reasonably be expected to, result in a reversal or modification of the judgment of conviction."

relationship and are unable to hire counsel face a bleak situation.[187] They face lawsuits that seek to stop criminal actions but afford none of the protections of criminal law.[188] They face actions that threaten to interfere with important, legitimate, and established constitutional rights to associate with their families as they choose.[189] This dangerous combination warrants the appointment of counsel to ensure due process under the Constitution.

Alexander T. Jones[*]

[187] Salas v. Cortez, 24 Cal. 3d 22, 31 (1979) ("A judgment rendered in this manner [without counsel] is not only unfair, it is unreliable.").

[188] For the standards used in a civil gang injunction, *see* People v. Englebrecht, 88 Cal. App. 4th. 1236, (Ct. App. 2001) (finding there is no right to a jury trial in a civil gang injunction action, and the standard of clear and convincing evidence is used in the determination of such actions); *see also* People v. Iraheta, 70 Cal. App. 4th 1500, 1514-1515(Ct. App. 1999) (finding no right to counsel in a civil gang injunction action). In contrast, for the standards used in criminal cases, *see* U.S. Constitution Amendment VI ("In criminal prosecutions, the accused shall enjoy the right [to a trial] by an impartial jury."); Clark v. Ariz., 548 U.S. 735, 738 (2006) ("[A] defendant is innocent unless and until the government proves beyond a reasonable doubt each element of the offense charged."); Gideon v. Wainwright, 372 U.S. 335, 343 (1963) (finding a right to counsel in criminal actions).

[189] *See* Moore v. City of E. Cleveland, 431 U.S. 494, 506 (1977).

[*] J.D. Candidate 2009, Golden Gate University School of Law, San Francisco, CA; B.A. Mathematics, University of California Santa Cruz; B.A. Philosophy, University of California Santa Cruz. I would like to thank Professor Helen Chang for her insightful comments and patience in going over my drafts, my editor Josh Sigal for his tireless efforts in reading my drafts, and finally my family for their love.