
Manufacturing Resilience on the Margins: Street Gangs, Property, & Vulnerability Theory

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ABSTRACT

Within law, contemporary street gangs are cast as corporatized criminal enterprises, whose primary goal is the acquisition of illicit economic capital. The sophistication of corporate gangs has led to the development of novel control mechanisms like gang injunctions, which are civil legal remedies employed to disperse unwanted gang activity from protected communities. This article suggests that the idea of property—and the vulnerability associated therewith—is central to understanding gangs. Accepting the well-established proposition that gangs arise due to the unavailability or inaccessibility of markets for mainstream and legitimized forms of capital, this article argues that gangs are best understood as corporate institutions engaged in the sustained, transgressive creation of alternative markets for the development of the types of property interests that scholars have associated with the development and pursuit of identity and “personhood.” That is, gangs are mechanisms through which networked vulnerable subjects seek to create resilience in each other.

The particular vulnerabilities to which gang members are least resilient have been clearly identified and thoroughly explored in sociological literature. Nonetheless, the criminological framing of gangs as creators rather than subjects of vulnerability within already marginalized communities has prevented widespread implementation or

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political consideration these realities. Instead, anti-gang strategies eliminate resilience to which gangs and their members have access by imposing a presumption of criminality on individuals believed to be associated with gangs and destabilize the sources of resilience available to people and institutions proximal to gangs.

Using the reimagined potential for government action and responsibility that vulnerability theory permits, this article suggests that local governments should compensate gang members for refraining from certain gang conduct. This approach, which has seen success when implemented by private and government actors (both in the gang and other contexts), offers a potentially effective response to gang member vulnerability—i.e. fostering resilience—that is responsive to the social justice, economic, and political considerations that gangs present.

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“A thing which you have enjoyed and used as your own for a long time. . . takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it.”

- Oliver Wendell Holmes¹

PROLOGUE

At Homeboy Industries, a forty-nine-year-old lifetime gangbanger whose skin and tattoos have begun to sag walks into Greg’s office and announces, “I don’t have an identity . . . I need help.” He is followed by a sixteen-year-old member of Tortilla Flats—David Escobar—who has been in four probation camps since he was eleven years old.

“Can you hang here, son?” Greg Boyle asks.

“Everyone in Compton is my enemy,” David answers.

“Yeah, but here everyone is your friend, no one is your enemy, and that includes people from all the neighborhoods in Compton.”

“You mean—I would work here with enemies?”

“No hanging, no banging, no slanging. And you get a job here and services—you get a life. Can you hang here, son?”

David looks at Greg—angry, frightened, defensive, alone.²

I. INTRODUCTION

The pages that follow advance a simple central proposition: Local governments should pay gang members to refrain from gang activity. But the deeper story this article tells is more complex, with implications far beyond the relatively confined world of the contemporary American street gang inhabited by an estimated 850,000 members.³ That more complex story is of the universal human condition of vulnerability, the instinct and imperative to build mechanisms to confront that vulnerability, and of property’s important role in that task.

1. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 477 (1897).

2. JORJA LEAP, JUMPED IN: WHAT GANGS TAUGHT ME ABOUT VIOLENCE, DRUGS, LOVE, AND REDEMPTION 216 (2012).

3. This figure constitutes less than one-half of one percent of Americans. See Arlen Egley Jr. et al., *Juvenile Justice Fact Sheet: Highlights of the 2012 National Youth Gang Survey*, U.S. OFFICE OF JUV. JUSTICE & DELINQ. PREVENTION 1 (Dec. 2014), <https://www.ojjdp.gov/pubs/248025.pdf>; cf. NAT’L GANG INTEL. CTR., NATIONAL GANG REPORT iii (2013) <https://www.fbi.gov/file-repository/stats-services-publications-national-gang-report-2013/view> [hereinafter 2013 NATIONAL GANG REPORT] (declining to estimate the number of gang members in the US because of both “inconclusive reporting” and “lack of confidence in estimates collected”).

The surface story of this article offers a provocative and unexpected approach to what is framed as a growing national, regional, and local gang threat.⁴ More predictable, is the response of local governments and law enforcement agencies, which have developed creative initiatives to disrupt and dismantle the reported 33,000 gangs across the country.⁵ Most of this experimentation has focused on variations on traditional policing, like the creation of specialized “gang units” within police departments and targeted heightened surveillance operations against gang leaders.⁶ However, in the 1980s and 1990s, political actors also turned to civil legal mechanisms to combat what continues to be framed as the growing, intractable menace of the corporatized, terroristic, criminal street gang.⁷

The wholly criminal image of street gangs reflected in the punitive (and criminalizing) orientation of anti-gang legal mechanisms, like gang injunctions, is myopic and fatally flawed. Street gangs and their constituent members often *do* engage in unlawful and criminal conduct.⁸ However, the consensus across the varied fields engaged in gang research is that the purpose of the contemporary gangs is not the commission of crime.⁹ Rather, violence and criminality are secondary or tertiary characteristics of gangs, necessitated by the inaccessibility of mainstream markets and the legal mechanisms that create, structure, and regulate those markets.¹⁰ Properly understood, street gangs are social institutions creating and operating in alternative markets for the kinds of social and financial capital that provides resilience to the universal vulnerability concomitant with the human condition and which is inaccessible to them through

4. See NAT'L GANG INTEL. CTR., NATIONAL GANG REPORT (2015) <https://www.fbi.gov/file-repository/stats-services-publications-national-gang-report-2015.pdf> [hereinafter 2015 NATIONAL GANG REPORT].

5. *Gangs*, FED. BUREAU OF INVESTIGATION, http://www.fbi.gov/about-us/investigate/vc_majorthfts/gangs (last visited Feb. 17, 2019).

6. See generally THE MODERN GANG READER § 5 (Arlen Egley Jr. et al. eds., 3d ed. 2006) (discussing various public programs and policies used to address gang-related problems).

7. EDWARD L. ALLAN, CIVIL GANG ABATEMENT: THE EFFECTIVENESS AND IMPLICATIONS OF POLICING BY INJUNCTION 63–65 (Marilyn McShane & Frank P. Williams III eds., 2004) (ebook).

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

9. Brenda C. Coughlin & Sudhir Alladi Venkatesh, *The Urban Street Gang After 1970*, 29 ANN. REV. SOC. 41, 44 (2003) (“the consensus appears to be that drug trafficking is usually a secondary interest compared to identity construction, protecting neighborhood territory, and recreation,” treated herein as central characteristics of property’s resilience functions). But see GEORGE W. KNOX, AN INTRODUCTION TO GANGS 636 (6th ed. 2006) (“Recall that a gang is a gang if and only if it engages in law violation behavior, either individually or collectively.”).

10. This same idea has been explored in depth with respect to pirates. See generally PETER T. LEESON, THE INVISIBLE HOOK: THE HIDDEN ECONOMICS OF PIRATES (2009).

traditional, sanctioned avenues for the production of resilience-generating capital. This factual reorientation does not make street gangs any less objectionable, but it does suggest that a just approach to gangs must reflect this reality.

This article provides the foundation for one such approach, offering a novel solution to the problems purportedly addressed by traditional regulation of gangs. A more nuanced rendition of the policy suggestion rudimentarily introduced above is this: Local governments should compensate gang members for refraining from certain, otherwise lawful, gang activity.

This gang compensation idea has both descriptive and prescriptive foundations, drawing on property theory and the vulnerability thesis. Parts II through IV set forth the descriptive claim of the article: Gangs are about not crime, but the resilience to vulnerability that property affords people.

A key function of the contemporary gang is the creation, use, and control of property.¹¹ Gangs control territory;¹² they communicate through the use of clothing and other heraldic devices;¹³ they create intangible assets on which they trade.¹⁴ These kinds of property are not merely income generators. Rather, they are connected to and necessary for human identity. This special category of “identity property” is uniquely situated to allow individuals to respond to, compensate for, adapt to, and even capitalize upon their vulnerability. That is, gangs are networked institutions of resilience that arise within an alternative market, where mainstream institutions and systems have failed to provide opportunities to create enough identity property to adequately inure gang members and their communities to their vulnerability. That insight frees anti-gang strategies from the confines of the criminal law and criminal law proxies and exposes social justice considerations not normally associated with gang regulation.¹⁵

Vulnerability theory is central to this reinterpretation of gangs. Vulnerability theory depathologizes vulnerability, recognizing that it is a universal, constant characteristic of humans and their institutions. Drawing on this insight, vulnerability theory—a rapidly developing

11. Lua Kamál Yuille, *Blood In, Buyout: A Property & Economic Approach to Street Gangs*, 2015 WIS. L. REV. 1049, 1119–1121 (2015).

12. See Olivier Bangerter, *Territorial Gangs and Their Consequences for Humanitarian Players*, 92 INT’L REV. RED CROSS 387, 396–97 (2010).

13. See KNOX, *supra* note 9, at 35–36; see also ARNOLD P. GOLDSTEIN & DONALD W. KODLUBOY, *GANGS IN SCHOOLS: SIGNS, SYMBOLS AND SOLUTIONS* 33–34, 46 (1998).

14. James A. Densley, *Under the Hood: The Mechanics of London’s Street Gangs* (2011) (unpublished Ph.D dissertation, St. Antony’s College) (on file with author) (“Gang value is based entirely on intangible assets, or what is known as ‘intellectual property’ in legitimate markets.”).

15. Social justice considerations are central to the discourse on gang prevention.

heuristic for addressing pressing socio-legal concerns—permits a deeper and more authentic understanding of how people engage with each other and their communities. It confronts “the reality that we all live and die within a fragile materiality that renders us constantly susceptible to both internal and external forces beyond our control” in order to demand what the theory’s intellectual shepherd, Martha Albertson Fineman, calls the “responsive state.” This responsive state is responsible for creating and supporting structures and avenues of resilience—i.e. those resources that allow individuals to confront, adapt to, ameliorate the consequences of, compensate for, or contain the universal human condition.

Building on that descriptive base, Part V of this article suggests that legal mechanisms that approach gangs as inescapably criminal are likely to be ineffective. Gangs are recreating a traditional market-based identity property, so the approach to the problems associated with them should reflect that orientation. In the market that gangs mirror, actors are paid to induce desired behavior. Such financial capital, and market institutions themselves, constitute an “essential but incomplete antidote”¹⁶ to inherent personal and institutional vulnerability.¹⁷ That is, they are a means for individuals to “recover from harm or setbacks”—they provide resilience to the vulnerability—all people face. A gang compensation strategy replicates this market outcome in the gang context and could form part of a comprehensive attack on gangs that is equally responsive to the crime control imperative as it is to broad social justice concerns.

II. STREET GANGS IN POPULAR LEGAL CONSCIOUSNESS

The consensus appears to be that street gangs, defined narrowly,¹⁸ are intractably pathological. The Federal Bureau of Investigation proclaims, “[t]hey poison our streets with drugs, violence, and all manner of crime.”¹⁹

16. Martha Albertson Fineman, *Vulnerability, Resilience, and LGBT Youth*, 23 TEMP. POL. & C.R. L. REV. 307, 320 n.73 (2014) [hereinafter Fineman, *LGBT Youth*].

17. *Id.* (defining “resilience” as “the ability to become strong, healthy, or successful again after something bad happens.”).

18. As has been my practice in previous work, this article limits its discussion to contemporary, U.S.-based, street gangs for definitional, conceptual, and practical reasons. While comparisons may be made among street gangs discussed here and U.S. prison gangs, domestic and international organized criminal organizations (i.e. the mafia), and other international and transnational gangs, those variations remain beyond the scope of the present analysis. This distinction is consistent with the practice of a range of gang observers. *See*, 2013 NATIONAL GANG REPORT, *supra* note 3, at 7-8 (distinguishing among street gangs, prison gangs, outlaw motorcycle gangs, and other gangs by definition); *see also* 2015 NATIONAL GANG REPORT, *supra* note 4, at 11-28 (treating separately street gangs, prison gangs, and outlaw motorcycle gangs).

19. FED. BUREAU OF INVESTIGATION, *supra* note 3.

Gang members are “brutal outlaws,”²⁰ complexly organized and deftly managed to plague the moral, culture, and financial foundations of their communities and threaten the futures of its children. Pronouncements against gangs are stark: “Few people can truly grasp the lifestyle residents of gang-dominated neighborhoods . . . must endure.”²¹ “The people of this community are prisoners in their own homes The area is an urban war zone.”²² “Residents kept their children locked indoors. Loud music, foul language, and gunfire echoed in the streets. Sidewalks and garage doors doubled as urinals. And citizens risked violent retaliation from gang members if they complained to police about rampant drug dealing, vandalism, and harassment.”²³ “This is the same street gang that has caused residents to remain indoors, to not allow their children to play outdoors, and has prevented relatives from visiting.”²⁴ “The United States spends \$20 billion a year treating the victims of gunshot wounds. ‘Gang violence is not only tearing at our moral culture and killing our children, it’s also picking our pockets.’”²⁵

According to these accounts, gang members are terrorists. However, this reflexive condemnation, should be understood in relation to the ontological settlements that dominate and motivate the legal system.

A. *The Liberal Legal Subject*

An atomistic conception of the rational, autonomous, liberal subject dominates legal frameworks, generally and with respect to the management of social deviance. “Western systems of law and justice have inherited a political perspective that imagines a ‘liberal legal subject’ as the ideal citizen—this subject is an autonomous, independent, and fully-functioning adult, who inhabits a world defined by individual, no societal responsibility, where state intervention or regulation is perceived as a violation of his liberty.”²⁶ The liberal subject offers an image of the

20. AM. CIVIL LIBERTIES UNION OF S. CAL., FALSE PREMISE, FALSE PROMISE: THE BLYTHE STREET GANG INJUNCTION AND ITS AFTERMATH 1 (May 1997), <http://bit.ly/2Ethku9> (quoting then-Los Angeles City Attorney Hahn).

21. Keasa Hollister, *Individual Autonomy Versus Community: Is It All or Nothing? An Analysis of City of Chicago v. Morales*, 28 PEPP. L. REV. 221, 254 (2000).

22. Arleen Jacobius, *Court Approves Gang Injunctions*, A.B.A. J., Apr. 1997, at 34, 34.

23. Julie Gannon Shoop, *Gang Warfare: Legal Battle Pits Personal Liberty Against Public Safety*, TRIAL, Mar. 1998, at 12, 12.

24. Philip Lee, *Chapter 34: Hitting Criminal Street Gangs Where It Hurts—Their Wallets*, 39 MCGEORGE L. REV. 577, 577 (2008).

25. Silvia Perez, *Alternatives in Fighting Street Gangs: Criminal Anti-Gang Ordinances v. Public Nuisance Laws*, 13 ST. THOMAS L. REV. 619, 619 (2001).

26. Martha Albertson Fineman, *Introducing Vulnerability*, in VULNERABILITY AND THE LEGAL ORGANIZATION OF WORK 1, 3 (Martha Albertson Fineman & Jonathan W. Fineman eds., 2018) [hereinafter Fineman, *Introducing Vulnerability*].

individual as *fungorum more*, sprung from the earth fully mature, autonomous, self-sufficient, free, and independent.²⁷ This ontological commitment, essentially, presumes that each individual is born, raised, and lives within the same empowering circumstances. This liberal subject has individual legal rights and can use these rights to address inequality and wrongs through the legal system.

When law “solicits the individual as the only relevant and wholly accountable actor,”²⁸ it is imperative that he be held responsible for his own welfare. The “responsibilization” concomitant with the conception of the liberal subject expects individuals take care of themselves, not depend on the state to do so. Dependency—however framed—is, therefore, perceived as individual failure.²⁹ The state’s role is limited to ensuring that everyone is treated the same, in accordance with a formal vision of equality. Indeed, “no public institution has to assist those who failed to privately help themselves.”³⁰

The liberal subject, spawned from an indelibly raced and gendered socio-legal-economic milieu, is itself built in the image of an idealized, unrealistic—mythological even—white male.³¹ Notwithstanding its empirical falsity, the identification of the liberal subject with whiteness and maleness means that the ontological space in which the liberal subject is presumptively situated is white and male. Thus, the proper role of the state reflects primarily the realities, concerns, and values that exist within that space.³²

27. In his well-known mushroom simile, the influential English philosopher Thomas Hobbes ideates socio-political institutions by “consider[ing] men as if even now [they] sprung up out of the earth, and suddenly, like mushrooms, come to full maturity, without all kind of engagement to each other.” THOMAS HOBBS, *PHILOSOPHICAL RUDIMENTS CONCERNING GOVERNMENT AND SOCIETY* (1651), *reprinted in 2 THE ENGLISH WORKS OF THOMAS HOBBS OF MALMESBURY* 1, 109 (William Molesworth ed., 1841).

28. WENDY BROWN, *UNDOING THE DEMOS: NEOLIBERALISM’S STEALTH REVOLUTION* 133 (2015) (ebook).

29. See MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* 31–34 (2005) [hereinafter FINEMAN, *AUTONOMY MYTH*].

30. Hila Keren, *Economizing Vulnerability: The Good, the Bad, and the Ugly* 7 (2016) (unpublished manuscript) (on file with the author).

31. See Alexandria Timmer, *A Quiet Revolution: Vulnerability in the European Court of Human Rights*, in *VULNERABILITY: REFLECTIONS ON A NEW ETHICAL FOUNDATION FOR LAW AND POLITICS* 147, 149–50 (Martha Alberston Fineman & Anna Gear eds., 2013); see also Lourdes Peroni & Alexandra Timmer, *Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law*, 11 *INT’L J. CONST. L.* 1056, 1060 (2013).

32. The, often complementary, fields of critical race theory and feminist legal theory provide expansive explorations of precisely the ways in which the legal system is raced and gendered. The ways the liberal subject is also heteronormative, cis-normative, secularly Christian, and bourgeois classed is far beyond the scope of the present discussion. For more on race and gender informed approaches to legal and socio-political analysis, see generally RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN*

B. *The Pathological Gang Subject*

Juxtaposed with the liberal subject, contemporary street gangs and their members are inevitably characterized within popular legal consciousness as intractably pathological.

The terroristic, modern image of the corporatized, mature, and criminal street gang emerged in the 1980s and 1990s. Preceding this period, a complex and contested range of factors—notably alienation from traditional labor markets that contracted then disappeared via deindustrialization³³—distorted established gang attrition patterns associated with the end of adolescence.³⁴ Facing sticky membership that lacked economic opportunity, gangs evolved to meld entrepreneurial exploits with the traditionally fraternal functions of the gang. By the 1990s, they were seen as networked organizations that demonstrated significant geographic mobilization; increasingly engaged in lethal gun violence; and relied on non-hierarchical, decentralized, and competitive profit-driven enterprises.³⁵

Today emblemized by the Crips and Bloods, originating in Los Angeles, or the Latin Kings and Vice Lords, born in Chicago,³⁶ these “persistent”³⁷ gangs are, moreover, comprised predominately of members

INTRODUCTION (2d ed. 2012) (introducing the key concepts and methodology of critical race theory); FEMINIST AND QUEER LEGAL THEORY: INTIMATE ENCOUNTERS, UNCOMFORTABLE CONVERSATIONS (Martha Alberston Fineman et al. eds., 2009) (anthologizing contemporary legal debates within, among, and across feminist and queer theorists); AT THE BOUNDARIES OF LAW: FEMINISM AND LEGAL THEORY (Martha Albertson Fineman & Nancy Sweet Thomadsen eds., 1991) (an early interdisciplinary exploration of the ways law impacts the construction of women’s roles, identities, and rights); Franciso Valdes, *Legal Reform and Social Justice – An Introduction to LatCrit Theory, Praxis and Community*, GRIFFITH L. REV. (2005) (providing an overview of a praxis centered approach to race inflected scholarship).

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

34. John M. Hagedorn, *Gangs in Late Modernity*, in GANGS IN THE GLOBAL CITY: ALTERNATIVES TO TRADITIONAL CRIMINOLOGY 295, 301–05 (John M. Hagedorn ed., 2007).

35. See John M. Hagedorn, *Race Not Space: A Revisionist History of Gangs in Chicago*, 91(2) J. OF AFR. AM. HIST. 194–208 (2006) [Hagedorn, *Race Not Space*].

36. For a description of these gangs, see for example, ALENJANDRO A. ALONSO, TERRITORIALITY AMONG AFRICAN AMERICAN STREET GANGS IN LOS ANGELES (1999) (published M.A. thesis, University of Southern California, UMI No. 1395119); R. D. Flores, *Crips and Bloods*, 13 CRIME & JUSTICE INT’L 6, 6–9 (1997).

37. Frederic Thrasher inaugurated the scientific study of gangs with *The Gang: A Study of 1,313 Gangs in Chicago*, his 1919–1926 study that raced gangs almost exclusively as White ethnic (Irish, Italian, German, Polish, and Lithuanian) found them to be a natural, interstitial feature of adolescence in predominantly poor, White ethnic enclaves. Participation in these gangs led, over time, to integration in mainstream, legitimized social institutions. See FREDERIC M. THRASHER, THE GANG: A STUDY OF 1,313 GANGS IN CHICAGO 191–94 (Robert E. Park ed., 1927); see also John M. Hagedorn, *Gang Violence in the Post-Industrial Era*, in 24 CRIME & JUSTICE: A REVIEW OF RESEARCH 365, 369 (Michael Tonry

who are neither White nor proto-White.³⁸ Instead, the contemporary gang is perceived as being “made up largely of darker-hued ethnic groups, especially African Americans and Latino Americans.”³⁹

The entrepreneurial and fraternal characteristics of gangs mimic closely the expectations of the responsabilization ethos of the liberal subject, “under which subjects are reconfigured as self-investors and self-providers and are expected to take care of themselves rather than expect the state to do so.”⁴⁰ However, as liberal subjects, gang members freely and autonomously choose to pursue these self-care obligations illicitly. The law presumes that liberal subjects face the same constellation of opportunities. If the opportunities are not comparable in a way that matters, then there is cognizable inequality that is remediable through accessible legal mechanisms of which the liberal subject is obliged to avail himself. In this analysis, the operation of race is invisible, irrelevant, and noncognizable. This ontological posture decontextualizes and dehistoricizes gangs, rendering them wholly pathological.⁴¹

III. THE VULNERABLE SUBJECT IN A STREET GANG

The one-dimensional popular image of the contemporary gang member is that of predatory drug terrorist.⁴² This view of street gangs

& Mark H. Moore eds., 1998) [hereinafter Hagedorn, *Post-Industrial Era*] (listing the scientific studies of gang activity that Frederic Thrasher inaugurated); Louis Holland, *Can Gang Recruitment Be Stopped? An Analysis of the Social and Legal Factors Affecting Anti-gang Legislation*, 21 J. CONTEMP. L. 259, 267 (1995); James Diego Vigil, *Urban Violence and Street Gangs*, 32 ANN. REV. ANTHRO. 225, 225 (2003) [hereinafter Vigil, *Urban Violence*].

38. Vigil, *Urban Violence*, *supra* note 37, at 225–28.

39. Vigil, *Urban Violence*, *supra* note 37, at 225. The race perception of contemporary gangs is inconsistent with empirical data. According to a 2006 survey, fourteen percent of gang members are White, *see* MATTHEW D. O’DEANE, GANG INJUNCTIONS AND ABATEMENT: USING CIVIL REMEDIES TO CURB GANG-RELATED CRIMES 155 (2012), and law enforcement fails to categorize and treat as gangs many White gang-like organizations. *See* Brian W. Ludeke, *Malibu Locals Only: “Boys Will Be Boys,” or Dangerous Street Gang? Why the Criminal Justice System’s Failure to Properly Identify Suburban Gangs Hurts Efforts to Fight Gangs*, 43 CAL. W. L. REV. 309, 319–20 (2007); *c.f.* National Youth Gang Survey Analysis: Demographics, NAT’L GANG CTR., <https://www.nationalgangcenter.gov/Survey-Analysis/Demographics#anchorregm> (last visited Feb. 17, 2019) (indicating that White people comprised closer to ten percent of gangs from 1996–2011).

40. Keren, *supra* note 30, at 6.

41. For the purposes of the present discussion, gang level application of the liberal subject as a behavioral heuristic is adequate. However, performing the same analysis with respect to the commonly accepted antecedents of gang membership would yield the same results.

42. Hagedorn, *Postindustrial Era*, *supra* note 37, at 366; KNOX, *supra* note 9, at 205. This paper uses the term “terrorist” generally to describe those who cause terror, without regard to whether they manifest the specific intent to incite fear or induce political change.

dominates popular legal conscious and determines prevailing approaches to the societal ills they represent or perpetuate. However, nearly a century of sustained research tracing the evolution of American gangs,⁴³ offers a much more complex and nuanced understanding of their function. This research demonstrates that the socio-cultural, political, and economic functions of gangs as social actors and societal institutions is the promotion and creation of a particularly important category of capital referred to, here, as “identity property.”⁴⁴

A. *The Vulnerable Subject*

Vulnerability theory is an evolving paradigm introduced by Martha Albertson Fineman.⁴⁵ Recognizing the reality that “we are born, live, and die within a fragile materiality that renders all of us constantly susceptible” to both internal and external forces beyond our control,⁴⁶ its descriptive foundation is that this vulnerability—i.e. “the concept that we are born unable to protect ourselves, we become feeble with age, we must fear natural disasters, and our social institutions might work against us”⁴⁷—is a fundamental and universal aspect of the human condition.

This version of vulnerability does not describe merely human susceptibility to harm or danger.⁴⁸ The fundamental characteristics of the human condition should be uncontroversial: Humans are composed of bone, flesh, and blood—material substances subject to the vagaries of the physical environment. They are animated by complex psyches that react

43. For a review of this literature, see generally KNOX, *supra* note 9.

44. This term refers to that property that implicates one’s being more fully human, as well as those property interests that impact one’s identity as such. For a full discussion and development of the concept, see Yuille, *supra* note 11, at 1086, 1105 n. 326.

45. See, e.g., Martha Albertson Fineman, *Beyond Identities: The Limits of an Antidiscrimination Approach to Equality*, 92 B.U. L. REV. 1713, 1718–19 (2012); Martha Albertson Fineman, *Feminism, Masculinities, and Multiple Identities*, 13 NEV. L.J. 619, 634–35 (2013); Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J. L. & FEMINISM 1, 9 (2008) [hereinafter Fineman, *Anchoring Equality*]; Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L. J. 251, 267–70 (2010) [hereinafter Fineman, *Responsive State*]. For further examples of vulnerability theory, see generally VULNERABILITY: REFLECTIONS ON A NEW ETHICAL FOUNDATION FOR LAW AND POLITICS, *supra* note 31; *Vulnerability and the Human Condition: Publications*, EMORY UNIV., <http://web.gs.emory.edu/vulnerability/resources/Publications.html> (last visited Dec. 14, 2018) (collecting resources regarding vulnerability theory).

46. Fineman, *Anchoring Equality*, *supra* note 45, at 9.

47. Frank Rudy Cooper, *Always Already Suspect: Revising Vulnerability Theory*, 93 N. C. L. REV. 1339, 1343 (2015); see also Michael Thomson, *Bioethics & Vulnerability: Recasting The Objects of Ethical Concern*, 67 EMORY L.J. 1207, 1219 (“It is part of our shared humanity that we all age and may be struck down by illness and natural or man-made disaster.”).

48. Fineman, *Responsive State*, *supra* note 45, at 255.

to internal and external phenomena. And, their lives are rooted in social, economic, and political institutions and relationships through which they manage the vocation of living.⁴⁹ At birth, *all* humans are, in and of themselves, defenseless. Advanced in age, they return (to greater or lesser degrees) to that state. And, throughout their lives, humans are persistently thrust into the position of dependence because of sickness, weather, child-bearing, child-rearing, occupational displacement, institutional transition, or any of an innumerable and often unpredictable amount of influences on human life. This natural, unavoidable, and constant susceptibility is vulnerability.⁵⁰ As Fineman explains,

Human vulnerability arises from our embodiment, which carries with it the imminent or ever-present possibility of harm, injury, and misfortune Bodily harm can result from the unleashing of forces of nature, from the mere passage of time, or from the fact that we humans exist in a world full of often-unpredictable material realities. While we can attempt to lessen risk or act to mitigate possible manifestations of our vulnerability, the possibility of harm cannot be eliminated.⁵¹

However, people's fragile materiality—the fundamental vulnerability of the human condition—is not merely a gross physical descriptor. Vulnerability is equally a characteristic of the human mind, human emotions, and human institutions. As a result of this universal and constant condition, all people require protection, care, and support.⁵²

This uncontroversial statement of the human condition depathologizes vulnerability, which is rhetorically associated with negative traits like poverty, dependence, otherness, and deficiency. As articulated, here, vulnerability is not a problem (though it can have negative or positive implications). It is not pathological. It is not a temporally bounded status or a state. “[H]uman vulnerability is universal and constant—there can be no position of invulnerability. Vulnerability IS the human condition.”⁵³ This understanding challenges propensity to identify “vulnerable populations” as a specific and negatively stigmatized

49. Fineman describes these aspects of the human condition as embodiment and embeddedness. See e.g., Martha Albertson Fineman, *Vulnerability and Inevitable Inequality*, 4 OSLO LAW REVIEW 133, 134 (2017) (“[A]s embodied beings, individual humans find themselves dependent upon, and embedded within, social relationships and institutions throughout the life-course.”).

50. Fineman, *Responsive State*, *supra* note 45, at 251–75.

51. *Id.* at 267.

52. Dependence is most evident during periods of infancy, advanced age, and infirmity, which “although episodic, [are] universally experienced.” Martha Albertson Fineman, *Equality and Difference—The Restrained State*, 66 ALA. L. REV. 609, 614 (2015) [hereinafter Fineman, *Restrained State*].

53. Fineman, *Introducing Vulnerability*, *supra* note 26, at 4.

subset of society.⁵⁴ Rather, since vulnerability is a universal and constant condition, all people require the care and support of others.

B. Gangs as a Product of Vulnerability

The vulnerability framework, then, provides additional conceptual tools to apply to street gangs. First, in contrast to the criminological view of gang members as creators of vulnerability, the universality and constancy of vulnerability makes clear that gang members are subjects of vulnerability. Moreover, conceptualized as institutions of transgressive capital creation, gangs themselves are depathologized. They simply provide resources and support not otherwise available to its members. Gangs are largely analogous to all other societal institutions, which are designed to provide resources and support.

C. Resilience as the Demand of Vulnerability Theory

The central innovation of Fineman's approach is that dependency is neither aberrant nor problematic. Dependency is not a liability. It is the "compelling impetus for the creation of social relationships and institutions."⁵⁵ The universal vulnerability of humans is what necessitates "the formation of families, communities, associations, and even political entities and nation-states."⁵⁶ At the same time, "institutions such as the family . . . are unable to eliminate individual vulnerability and are themselves vulnerable structures susceptible to harm and change."⁵⁷ The social institutions that people construct are designed to mitigate human vulnerability and to provide individuals with resources and support necessary to confront their vulnerability.⁵⁸

The inescapability of vulnerability suggests that there is no state of invulnerability; there is only the possibility of "resilience."⁵⁹ This resilience is the accumulation of sufficient resources to allow individuals to confront, adapt to, ameliorate, compensate for, or contain vulnerability.⁶⁰

54. Martha Albertson Fineman, "*Elderly*" as *Vulnerable: Rethinking the Nature of Individual and Societal Responsibility*, 20 *ELDER L.J.* 71, 86 (2012) ("The designation of vulnerable (inferior) populations reinforces and valorizes the ideal liberal subject, who is positioned as the polar opposite of the vulnerable population. This liberal subject is thus constructed as invulnerable, or at least differently vulnerable, and represents the desirable and achievable ideals of autonomy, independence, and self-sufficiency.").

55. *Id.*

56. *Id.*

57. Fineman, *Anchoring Equality*, *supra* note 45, at 11.

58. *Id.*

59. Fineman, *Responsive State*, *supra* note 45, at 270.

60. *Id.* at 269–70.

Resilience has been defined in many ways. It is the ability to “bounce back” and continue to function. It is predicting, preventing, and minimizing the potentially disruptive consequences of vulnerability. It is the accumulation of sufficient resources to allow individuals to confront, adapt to, ameliorate, compensate for, or contain vulnerability.⁶¹ “Resilience is perceived as necessary to both confront life’s challenges and to allow individuals to rise to take advantage of life’s opportunities and enjoyments.”⁶² Moreover, unlike vulnerability, resilience is not an innate condition.⁶³ Instead, individuals accumulate the resources that confer resilience over time and within and through social institutions and relationships.⁶⁴ Indeed, social institutions—families, communities, associations, and political entities and nation-states—are designed to mitigate human vulnerability by facilitating the accumulation of the resources necessary to “bounce back” from the impacts of vulnerability.⁶⁵

Thus, vulnerability theory can be framed as a social justice project that mandates the building of resilience. Vulnerability theory does this through the advancement of a “responsive state.” By continuously monitoring, evaluating, updating, and reforming its institutions, a responsive state provides and supports the institutions that help create such resilience.⁶⁶ The responsive state must alter institutional arrangements that create resilience and privilege, while perpetuating disadvantage. Vulnerability theory also frames discourse in terms of the “deficiencies of institutions and the failure of state regulation rather than the deficiencies and failures of individuals.”⁶⁷

Unarguably, for gang members and, often, the marginalized communities in which they are situated, the responsive state is absent. Indeed, the state itself frequently serves to undermine the resilience mechanisms that do exist. This leads to the capital deficits that are correlated with gang membership and emergence. Without the sanctioned resilience mechanisms, street gangs fill this function.

61. *Id.*

62. Jonathan Fineman, *The Vulnerable Subject at Work: A New Perspective on the Employment At-Will Debate*, 43 SW. L. REV. 275, 301 (2013).

63. *Id.* at 301–02.

64. *Id.*

65. Fineman, *Responsive State*, *supra* note 45, at 269–70.

66. *Id.* at 274.

67. Fineman, *LGBT Youth*, *supra* note 16, at 311; *see* FINEMAN, AUTONOMY MYTH, *supra* note 29, at 264–65 (discussing systemic political corruption stemming from the recalcitrance of vested interests towards disruptive programs and policies); *see also* Fineman, *Anchoring Equality*, *supra* note 45, at 15–19.

IV. THE FUNDAMENTAL ROLE OF PROPERTY IN GANG RESILIENCE

Through the lens of a vulnerable legal subject, a lack of resilience most often is a function of unequal access to certain societal structures and/or unequal allocations of privilege and power within those structures. This conceptual reframing moves the analysis from dichotomizing perpetrators and victims to recognizing gangs and their impacts on communities as the failure of the state or a failure of institutional support.

A. *Gangs as Capital Generators*

The interdisciplinary cohort of scholars that study gangs have reached a consensus that violence, criminality, and entrepreneurialism are secondary or tertiary undertakings of the types of gangs subject to gang injunctions.⁶⁸ Instead, these gangs tend to fill gaps that arise due to the unavailability or inaccessibility of mainstream and legitimized forms of what Pierre Bourdieu taxonomized as economic, social, cultural and symbolic capital.⁶⁹

Simply put, economic capital is material wealth.⁷⁰ Cultural capital is knowledge, skills, and cultural acquisitions (e.g. educational or technical qualifications).⁷¹ Social capital is comprised of social connections, membership in social groups, or access to social networks.⁷² And, symbolic capital is based on one's "prestige, authority, and so on."⁷³ The

68. See KNOX, *supra* note 9, at 636–38 (citing sources exploring gang typologies).

69. Pierre Bourdieu, *The Forms of Capital*, in HANDBOOK OF THEORY AND RESEARCH FOR THE SOCIOLOGY OF EDUCATION 241, 243 (John G. Richardson ed., 1986) [hereinafter Bourdieu, *Forms of Capital*]; see also Brenda C. Coughlin & Sudhir Alladi Venkatesh, *The Urban Street Gang After 1970*, 29 ANN. REV. OF SOC. 41, 44 (2003) (citing articles creating a general "consensus" that identity construction is the primary function of gangs). For a brief intellectual history of the "plethora of capitals," see Michael Woolcock, *Social Capital and Economic Development: Toward a Theoretical Synthesis and Policy Framework*, 27 THEORY & SOC'Y 151, 155 & n.19, 159–61 (1998).

70. Bourdieu, *Forms of Capital*, *supra* note 69, at 243.

71. *Id.* Cultural capital is further differentiated into subtypes: embodied, objectified (e.g., physical cultural goods, like books), and institutionalized (e.g., institutional recognition of such capital, like diplomas). *Id.* For Bourdieu, the neo-classical economic concept of human capital most associated with Schultz (see, e.g., Theodore W. Schultz, *Investment in Human Capital*, 51 American Economic Review 1, 1-17 (1961) (identifying the phenomenon of human capital)) and Becker (see, e.g., Gary S. Becker, *Investment in Human Capital: A Theoretical Analysis*, 70 Journal of Political Economy 9, (1962) (describing investment in human capital as "the imbedding of resources in people"), would fall within this category.

72. *Id.* at 248–49 ("Social capital is the aggregate of the actual or potential resources which are linked to possession of a durable network of more or less institutionalized relationships of mutual acquaintance and recognition.").

73. Pierre Bourdieu & Loïc Wacquant, *Symbolic Capital and Social Classes*, 13 Journal of Classical Sociology 292, 297 (2013).

particular volume and composition of capital for an actor motivates that actor's actions towards particular types of goals and interests and facilitates "social mobility."⁷⁴ Conversely, lack of access to capital (or certain forms thereof) constrains the constellation of pursuits and interests available to the individual or group experiencing the capital deficit.⁷⁵

This brief review of Bourdieu's capital taxonomy facilitates the disaggregation of the interconnected licit and illicit roles a gang plays not only in affected communities but also for its individual members.⁷⁶ Criminological, legal, and political literature—documenting popular legal consciousness—focuses on the illicit facets. For example, research documents the ways contemporary gangs have evolved into vehicles of economic capital growth by creating long-term opportunities for "financial mobility" in response to alienation from and demotion in legitimate labor markets.⁷⁷

However, extensive evidence illustrates the ways that gangs are the source of significant alternate cultural, social, and symbolic capital. There are many theories of gang development and membership that frame these capital contributions differently. For example, anomie or strain theory posits that gangs form a delinquent subculture in response to "status frustration" (*i.e.* opportunities to "succeed" as defined by mainstream society are unavailable).⁷⁸ Social disorganization posits that gangs form when social institutions responsible for transmitting societal norms are weak.⁷⁹ "Multiple marginality" theory considers gangs the outcome of marginalization at the multiple levels, integrating the cultural insights of anomie theory, the ecological insights of social disorganization theory, as well as key socioeconomic, historical, macrostructural, and social

74. See Bourdieu, *The Forms of Capital*, *supra* note 69, at 252–55. Writing from a neo-Marxist perspective, Bourdieu saw the motivational power of capital as distinctly in line with traditional capitalist values.

75. See *id.* at 241–42.

76. See generally Kay Kei-Ho Pih et al., *Different Strokes for Different Gangs? An Analysis of Capital Among Latino and Asian Gang Members*, 51 SOC. PERSPECTIVES 473 (2008) (providing a detailed discussion of Bourdieu's theoretical framework). The Bourdieuan construct is not directly addressed in most relevant literature, but the substantive insight is consistent with his capital taxonomy.

77. See, e.g., Steven D. Levitt & Sudhir Alladi Venkatesh, *An Economic Analysis of a Drug-Selling Gang's Finances*, 115 Q.J. OF ECON. 755, 755–56 (2000). Moderate success achieved with respect to economic capital, in turn, permits gang involvement to serve as a substitute for acquisition of legitimized human capital through education and training. See, e.g., Pih et al., *supra* note 76, at 484–85.

78. See, e.g., SCOTT H. DECKER & BARRIK VAN WINKLE, *LIFE IN THE GANG: FAMILIES, FRIENDS, AND VIOLENCE* 7–8 (1996).

79. See, e.g., Irving A. Spergel and G. David Curry, *The National Youth Gang Survey: A Research and Development Process*, in *THE GANG INTERVENTION HANDBOOK* 359, 383–86 (Arnold P. Goldstein & C. Ronald Huff eds., 1993).

psychological theories of gang formation.⁸⁰ Complementing these institutional explanations, individual antecedents of gang membership are generally thought to include environmental and personal vulnerabilities like living in socially disorganized areas, weak family structures, low or failing educational expectations or achievement, and association with deviant peers or family.⁸¹

The common insight of these viewpoints is their diagnosis of the disjunction between mainstream sources of capital and the alternatives produced by gangs.⁸² “Linguistic capital” provides a good example. Underclass youth, who participate in street gangs at higher rates than other youth, demonstrate deficits in their use of standard language patterns (i.e. speaking standard English) because they are excluded from social networks that value linguistic capital.⁸³ Exclusion from social networks results in social capital deficits that reinforce labor market and educational obstacles. Those obstacles, in turn, further reduce economic and cultural capital. This creates cyclical obstacles to acquiring social capital.⁸⁴ Gangs respond to these deficits by developing distinctive gang vernaculars⁸⁵ that provide entry-level access to avenues for the acquisition of what can be called “gang capital,” which is capital having value in the normative spaces gangs create.

The creation and exchange of gang capital is, generally, connected to and supported by the financial capital most gangs develop through illicit channels. However, the most gang capital is created and exchanged through expressly legal or unregulated means. A gang’s main focus is not the creation of financial capital; it is the provision of surrogate sources of identity solidarity. Such identity becomes a valuable resource because the gang fills gaps left by other socio-cultural institutions.⁸⁶ This gap filling

80. See, e.g., James Diego Vigil, *A Multiple Marginality Framework of Gangs*, in THE MODERN GANG READER, *supra* note 6, at 20, 20–29.

81. Terence P. Thornberry et al., *The Antecedents of Gang Membership*, in THE MODERN GANG READER, *supra* note 6, at 30, 31–33.

82. James Diego Vigil, *Group Processes and Street Identity: Adolescent Chicano Gang Members*, 16 ETHOS 421, 426 (1988).

83. See PIERRE BOURDIEU, LANGUAGE AND SYMBOLIC POWER 46–65 (John B. Thompson ed., Gino Raymond & Matthew Adamson trans., 1991).

84. Prudence L. Carter, “Black” Cultural Capital, Status Positioning, and Schooling Conflicts for Low-Income African American Youth, 50 SOC. PROBLEMS 136, 136–55 (2003).

85. See generally RUSSELL D. FLORES, GANG SLANGING: A COLLECTION OF WORDS AND PHRASES USED BY GANG MEMBERS (2d ed. 1998) (detailing common gang vernacular); Nat’l Gang Crime Research Ctr., *The Gang Dictionary: A Guide to Gang Slang, Gang Vocabulary, and Gang Sociolinguistic Phrases*, J. GANG RES., Summer 1997, at 66 (same).

86. See, e.g., Deborah Lamm Weisel, *The Evolution of Street Gangs: An Examination of Form and Variation* in THE MODERN GANG READER, *supra* note 6 at 94–95 (describing the individual and group rewards associated with gang membership); Felix Padilla, *The Working Gang* in THE MODERN GANG READER, *supra* note 6 at 142–143 (describing the

results in the formation of a shared normative community (distinct from the mainstream normative community in which gang members are situated) in which alternative gang capital has purchase and cachet: “Gangs represent the spontaneous effort of boys to create a society for themselves where none adequate to their needs exists.”⁸⁷

Gangs engage in a range of activities, the core function of which is the pursuit of identity formulation and capital creation. However, the most salient of those activities is gangs’ use of the colors, signs, and symbols.⁸⁸ The display of gang symbols through hand signs and unique identifying graffiti communicates a gang’s presence in and claim of dominance over a geographic space.⁸⁹ The borders of a gang’s geographic territory are clearly charted by its distinctive graffiti.⁹⁰ By deploying a gang’s symbols—wearing distinctive clothing and colors, physically marking their body with gang tattoos, incorporating gang symbols into their personal belongings, and adopting gang vernacular—members occupy space in the community’s consciousness. This performance, in turn, accords the gangs respect and status within the physical space to which they lay claim.

Gang symbology is symbiotically connected to gang territoriality. Gangs create physical and psychological territories in which their identity has normative force. The capital associated with that identity has positive value. Gang territoriality itself is also a key aspect of the development of gang capital.⁹¹ Most gang activity is at least indirectly related to such territoriality. For example, gangs physically occupy public and private spaces in their claimed geographic territory to reinforce the symbolic territorial markings of graffiti.⁹² Within secured territories,⁹³ gang members often perform traditional functions of owners. They determine

development of a “gang culture” as the response to shared conditions); Beth Caldwell, *Criminalizing Day-to-Day Life: A Socio-Legal Critique of Gang Injunctions*, 37 *Am. J. Crim. L.* 241, 260-62 (2010) (arguing that gangs are the product of social marginalization).

87. See, e.g., THRASHER, *supra* note 37, at 37.

88. KNOX, *supra* note 9, at 35–36; see also GOLDSTEIN & KODLUBOY, *supra* note 13, at 33–52.

89. GOLDSTEIN & KODLUBOY, *supra* note 13, at 34–40.

90. See generally David Ley & Roman Cybriwsky, *Urban Graffiti as Territorial Markers*, 64 *ANNALS ASS’N AM. GEOGRAPHERS* 491 (1974).

91. This is evidenced, for example, in by the sheer number of gangs whose names are related to the geographic territory they claim. Bangerter, *supra* note 12, at 396.

92. See generally, P. Jeffrey Brantingham et al., *The Ecology Of Gang Territorial Boundaries*, 50 *Criminology* 851 (2012); Karen L. Adams & Anne Winter, *Gang Graffiti as a Discourse Genre*, 1 *Journal of Sociolinguistics* 337–360 (1997).

93. In unstable or contested spaces, territorial claims may be enforced (or charted) through force.

access. They control markets. They perform protective functions for community members.⁹⁴ They disaggregate, cede, and transfer their claims.

Decentering the predatory criminality and violence with which gangs are associated reveals a view of gangs in which they value and desire access to conventional sources of capital.⁹⁵ With standard avenues of capital acquisition obstructed, unavailable, or inaccessible, they create alternatives. This enriched framing of gangs grounded in available and accepted empirical and qualitative data, aligns with the capital deficit formulation advanced above and creates a link to a growing body of legal literature focused on human vulnerability.

B. *Property Corollaries to Vulnerability Theory*

The preceding section recast the central function of gangs as the production, reproduction, and protection of resilience through the generation of capital. This idea has clear corollaries and antecedents within a diverse body of property perspectives. Even though the concept has not been characterized in these terms, a central function of property is that the accumulation of property allows individuals to confront, adapt to, ameliorate, compensate for, or recover from the consequences of their vulnerability. To illustrate this idea, it serves to consider several salient examples.

In *The New Property*,⁹⁶ Charles A. Reich described property as “guard[ing] the troubled boundary between individual man and the state,”⁹⁷ concluding that it facilitated the individual’s ability to control his own life.⁹⁸ Reich’s controversial descriptive and prescriptive claims operationalized the idea that property cannot be understood outside of its social context. Property is a deliberate social construct that can be wielded to promote societal interests.⁹⁹

94. George Knox cites gangs that have implemented litter clean up regimes, organized community social events, and doled out largess to incapacitated members. Knox also reports that host community members themselves may solicit the gang’s exercise of such ownership functions. KNOX, *supra* note 9, at 23–25, 32.

95. Scott H. Decker & Janet L. Lauritsen, *Leaving the Gang*, in THE MODERN GANG READER, *supra* note 6, at 60, 65.

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

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

98. *Id.* at 733. Reich later argued that his interest was to collapse the distinction among the constitutional categories of “life, liberty, and property,” which is at least implicitly a key insight of classical liberal thought. *Id.* at 771-74.

99. Property as a social construct has clear classical antecedents. *See, e.g.*, DAVID A. SCHULTZ, PROPERTY, POWER, AND AMERICAN DEMOCRACY 19 (1992) (describing Sir William Blackstone’s view of property as “a conventional institution created by law, habit, or the passage of time . . . [The] rules prescribing its use and transfer were determined by

Beginning with *Property and Personhood*,¹⁰⁰ Margaret Jane Radin asserted, “to achieve proper self-development—to be a person—an individual needs some control over resources in the external environment.”¹⁰¹ The purpose of property rights, then, is to secure such control.¹⁰² Thus, property that is “important to the freedom, identity, and contextuality of people”¹⁰³ is a fundamental category that deserves greater legal protection.¹⁰⁴ Radin explained,

Where we can ascertain that a given property right is personal, there is a prima facie case that that right should be protected to some extent against invasion by government and against cancellation by conflicting fungible property claims of other people. This case is strongest where without the claimed protection of property as personal, the claimants’ opportunities to become fully developed persons in the context of our society would be destroyed or significantly lessened, and probably also where the personal property rights are claimed by individuals who are maintaining and expressing their group identity.¹⁰⁵

Eduardo Peñalver explained how property rights are fundamental to the constitution of communities.¹⁰⁶ It is well established that property is a necessary and useful concept only in a community context. “In the world

society.”); JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM 248 (1990) (“[P]roperty is, of all the basic rights, perhaps most obviously the creation of the state.”).

100. Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982) [hereinafter Radin, *Property and Personhood*]. Though the discussion here relies primarily on *Property and Personhood*, Radin has refined, developed, and evolved her theory of property in a series of well-recognized articles and books. See generally Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987); Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667 (1988) [hereinafter Radin, *Liberal Conception of Property*]; MARGARET JANE RADIN, REINTERPRETING PROPERTY (1993) (ebook); MARGARET JANE RADIN, CONTESTED COMMODITIES (1996); Margaret Jane Radin, *Property Evolving in Cyberspace*, 15 J.L. & COM. 509 (1996).

101. Radin, *Property and Personhood*, *supra* note 100, at 957.

102. An alternative construction of that control focuses on the control of the social relations connected to an object—the relationship among individuals—rather than the particular connection a person has to the object itself. This tracks Radin’s insights from her distinctly *in rem* understanding of property to a relational understanding thereof. See Lisa M. Austin, *Person, Place, or Thing? Property and the Structuring of Social Relations*, 60 U. TORONTO L.J. 445 (2010). This interesting alignment of Radin’s theory does not change its underlying import.

103. Radin, *Liberal Conception of Property*, *supra* note 100, at 1686. Radin calls this property for personhood. *Id.* at 1687.

104. See Radin, *Property and Personhood*, *supra* note 100, at 1014–15.

105. *Id.*

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

of Robinson Crusoe property rights play no role.”¹⁰⁷ However, Peñalver’s insight advances a different proposition: property is “an institution that binds individuals together into normative communities.”¹⁰⁸ Peñalver calls this idea “property as entrance.”¹⁰⁹

The normative underpinnings of property as entrance are anchored in an Aristotelian community theory of property advanced by Peñalver and Gregory Alexander.¹¹⁰ That theory conceives of people as social and political animals inherently dependent and interdependent on other people to develop the uniquely “human capacities” necessary for “human flourishing,”¹¹¹ a rich concept that “must include at least the capacity to make meaningful choices among alternative life horizons.”¹¹² That capacity justifies the value and effort invested in individual autonomy.¹¹³ In the communitarian framework, property facilitates access to the human networks that allow an individual to become fully human.¹¹⁴

Such community access, however, is mediated by the socio-cultural meanings attached to property.¹¹⁵ Among the denominative or expressive functions of property is its ability to signal the status of the property owner in the community. Nestor Davidson has explored the manifestation of this

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

108. Peñalver, *supra* note 106, at 1972.

109. *Id. passim*.

110. See generally ALEXANDER & PEÑALVER, AN INTRODUCTION TO PROPERTY THEORY (2012) (ebook). Alexander has elaborated this concept of community. See generally GREGORY S. ALEXANDER, THE GLOBAL DEBATE OVER CONSTITUTIONAL PROPERTY: LESSONS FOR AMERICAN TAKINGS JURISPRUDENCE (2006).

111. Without providing an exhaustive analysis of the “well-lived life” implied by human flourishing, Peñalver and Alexander broadly include at least four capabilities necessary to the pursuit thereof: life, freedom, practical reason, and affiliation. ALEXANDER & PEÑALVER, *supra* note 110, at 89–90.

112. *Id.* at 88. They further explain the contours of “meaningful” decision-making within a robust conception of freedom as including both the ability to discern the “salient differences” among choices and “deliberate deeply” about their relative value. *Id.* For an elaboration of this idea in the property context, see generally Colin Crawford, *The Social Function of Property and the Human Capacity to Flourish*, 80 FORDHAM L. REV. 1089 (2011).

113. ALEXANDER & PEÑALVER, *supra* note 110, at 87.

114. Alexander and Peñalver’s prescriptive conclusion asserts that their communitarian/human flourishing analysis provides a valuable heuristic for resolving property questions. *Id.* at 92–97. León Duguit’s view of property as a social function in service of community solidarity reaches a more rigid conclusion that property should only be protected where it fulfills this social function. See Sheila R. Foster & Daniel Bonilla, *The Social Function of Property: A Comparative Perspective*, 80 FORDHAM L. REV. 1003, 1004–07 (2011).

115. Jeffrey Douglas Jones advances the importance of socio-cultural meaning to suggest that the relevant unit of analysis is the way property advances specific “sociocultural meanings grounded in specific object relationships” rather than property for personhood. Jeffrey Douglas Jones, *Property and Personhood Revisited*, 1 WAKE FOREST J.L. & POL’Y 93, 127–31 (2011).

role on several levels.¹¹⁶ In its thin form, the expressive function of property is to denote the relationship of a party to a valuable resource and/or the relationship of several parties to each other with respect to that resource.¹¹⁷ Property's thick expressive role is to shape and reinforce the economic, social, and cultural hierarchies that define mutual obligations and set the borders of social relations.¹¹⁸ The type, volume, and composition of an individual's ownership situates that individual horizontally and vertically in the social order.¹¹⁹ Thus, property not only constitutes communities, it orders them.

C. *Property & Resilience*

None of these authors has engaged either gangs or vulnerability theory in the ways suggested here. However, the applicability of these concepts is intuitive. Like all people, gang members face acute institutional, economic, and physical vulnerability. Indeed, the dominant view is that gangs are caused by the absence or breakdown of community institutions (e.g. family, school, church and local government). These institutions transmit mainstream social norms that enable individuals to better respond to the consequences of their vulnerability. These norms take the form of capital, or resources that individuals use to facilitate either their acquisition of additional capital or social mobility. Thoroughly excluded from meaningful access to one system capital, gangs have created their own parallel system in which they are able not only to acquire capital that is valuable within that parallel system but also attempt to compel their admittance into the mainstream system. Gangs, then, fill an institutional gap by providing avenues to pursue the kinds of capital to which the gang members have limited access. The accumulation of this capital, or identity property, lessens the risk posed by and mitigates the impact of gang vulnerability.

This ability to manage the consequences of vulnerability is resilience. So, membership in the gang facilitates resilience.

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

117. These are the alternative basic definitions of property that are often the core of the property theory debate. See *supra* notes 97–99 and accompanying text.

118. Davidson, *supra* note 116, at 771–74.

119. This function clearly correlates to the Bourdieuan idea of capital facilitating social mobility. See *supra* notes 69–79 and accompanying text. Davidson explores the connection between social mobility and property with respect to implications of stability and instability in the institution of property and how the law can or should be used to influence those implications. Davidson, *supra* note 116, at 807–10.

V. PAID INJUNCTIONS AS RESILIENCE

The preceding discussion reframed the contemporary American street gang as a mechanism for the generation of resilience to which its members turn when mainstream or sanctioned mechanisms of resilience are deficient or inadequate. An important implication flows from reenvisioning gangs in this way: If gangs generate resilience, then the tools that are deployed to dismantle gangs necessarily impede the development of that resilience.

This part describes the basic gang injunction, an important tool that law enforcement has developed to respond to gangs that has resilience defeating consequences. Then, accepting that vulnerability theory's demand for the responsive state makes this approach to gangs indefensible, it suggests the *paid* injunction as the responsive state alternative to the standard approach.

A. *Prevailing Anti-Gang Strategies*

The social crises that catalyzed¹²⁰ the changes in street gangs that earned their contemporary reputation¹²¹ came at a moment in political-economic history in which investing public resources in the underlying causes of the street gang problem was patently untenable.¹²² At the same historical moment, so-called “tough on crime” law enforcement models were proving inadequate in a legal context that had disapproved of

120. See, e.g., Jeffrey A. Fagan, *The Social Organization of Drug Use and Drug Dealing Among Urban Gangs*, 27 CRIMINOLOGY 633, 635, 661–62 (1989); Vigil, *Urban Violence*, *supra* note 37, at 225–242; John M. Hagedorn, *Gangs as Social Actors*, in THE ESSENTIAL CRIMINOLOGY READER 141, 145–47 (Stuart Henry & Mark M. Lanier, eds., 2006); Hagedorn, *Post-Industrial Era*, *supra* note 37, at 457–511;

121. Specifically, (1) the impact of post-industrial era in working class urban; and suburban minority communities, see, e.g., Sides, *supra* note 33, at 583–605; and (2) the introduction and popularization of crack cocaine, see, e.g., Jeff Grogger & Michael Willis, *The Emergence of Crack Cocaine and the Rise in Urban Crime Rates*, 82 REV. ECON. & STAT. 519, 519 (2000); Janet L. Dolgin, *The Law's Response to Parental Alcohol and "Crack" Abuse*, 56 BROOK. L. REV. 1213, 1222 (1991); Richard Dvorak, *Cracking the Code: "De-Coding" Colorblind Slurs During the Congressional Crack Cocaine Debates*, 5 MICH. J. RACE & L. 611, 646–47 (2000) (citing James A. Inciardi, *Beyond Cocaine: Basuco, Crack, and Other Coca Products*, 14 CONTEMP. DRUG PROBS. 461, 482 (1987)); Hagedorn, *Race Not Space*, *supra* note 35, at 194–208.

122. That is, the contemporary political and economic priorities—which Hila Keren, *supra* note 30, now describes as neoliberalism's responsabilization fetish—did not include and, in fact, expressly rejected funding non-criminal approaches to social disorder. See generally CHRISTOPHER PIERSON, *BEYOND THE WELFARE STATE?* 143–52 (3rd ed. 2006) (providing a detailed evolution of critiques of government financial support of the health and well-being of poor people); Irving A. Spergel, *Youth Gangs: An Essay Review*, 66 SOC. SERV. REV. 121, 121–22 (1992) (describing central factors in the lack of political support for youth services and gang prevention, including fragmentation of social service labor and the popularity of political conservatism).

traditional order and maintenance policing.¹²³ Local governments and law enforcement agencies have responded to the plague of gangs predictably, developing creative initiatives they claim disrupt or eliminate gangs. Most experimentation has focused on variations on traditional policing. For example, jurisdictions criminalized gang membership,¹²⁴ created specialized “gang units” within police departments, and targeted heightened surveillance operations against gang leaders.¹²⁵ However, political actors also turned to civil legal mechanisms to combat the growing, intractable menace.¹²⁶

Chicago’s juvenile street gangs were the first to be studied systematically¹²⁷ and remain a mine for important data on the functioning of contemporary gangs.¹²⁸ It is, therefore, unsurprising that the most well-known experimentation in gang control mechanisms was developed and deployed in Chicago. In 1992, the city passed its Gang Congregation Ordinance. Notwithstanding well-settled case law indicating that loitering statutes were unconstitutional,¹²⁹ the prophylactic anti-gang loitering ordinance gave police broad discretion to disperse any group of two or more people who were in a public place “with no apparent purpose” if one of the individuals was “suspected” of being a gang member.¹³⁰ Failure to

123. So-called “order-maintenance policing” is characterized by the broad delegation of discretionary power to local police to “keep the peace” (read: enforce community norms of decency and aesthetics) through a constellation of tools that include the informal exercise of authority, as well as the power to arrest individuals for relatively minor offenses (e.g. “breaching the peace,” “suspicion,” loitering, and vagrancy) that exist at least primarily to provide the police with tools to remove undesirable persons from public spaces. See Nicole Stelle Garnett, *Ordering (And Order In) The City*, 57 STAN. L. REV. 1, 8 (2004); Gregory S. Walston, *Taking the Constitution at Its Word: A Defense of the Use of Anti-Gang Injunctions*, 54 U. MIAMI L. REV. 47, 51–53 (1999). But see Ryan Young, *Sharpen the Blade: Void for Vagueness and Service of Process Concerns in Civil Gang Injunctions*, 40 MCGEORGE L. REV. 1001, 1004 (2009); Sides, *supra* note 33, at 583–60; David R. Truman, *The Jets and Sharks are Dead: State Statutory Responses to Criminal Street Gangs*, 73 WASH. U. L.Q. 683, 686–90 (1995).

124. For example, California’s Street Terrorism Enforcement and Prevention Act not only criminalizes gang participation, but also permits enhancements for more than thirty felonies when committed by a gang member. See CAL. PENAL CODE §§ 186.21, 654 (West 2018).

125. For a discussion of these mechanisms, see Eva Rosen & Sudhir Venkatesh, *Legal Innovation and the Control of Gang Behavior*, 3 ANN. REV. L. & SOC. SCI. 255, 258 (2007).

126. *Id.*

127. See generally THRASHER, *supra* note 37.

128. Louis Holland, *Can Gang Recruitment be Stopped? An Analysis of the Social and Legal Factors Affecting Anti-gang Legislation*, 21 J. CONTEMP. L. 259, 267 (1995); Hagedorn, *Postindustrial Era*, *supra* note 37, at 369.

129. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 156 n.1, 165–71 (1972) (declaring unconstitutionally vague a vagrancy ordinance which included loitering, defined as “wandering or strolling around from place to place without any lawful purpose or object.”).

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

disperse on command could result in arrest, fines up to \$500, and six month's imprisonment.¹³¹ The U.S. Supreme Court struck down the ordinance in 1999;¹³² however, its passage and the wave of emulation it prompted are illustrative of local government perspectives and approaches.¹³³

Joint innovation efforts in Southern California, whose gang presence earned internationally notoriety during the 1980s and 1990s, resulted in a civil anti-gang strategy that has withstood judicial review.¹³⁴ The path to the gang injunction began with "single situs" property abatements,¹³⁵ which are injunctions that target one parcel of private property as a nuisance because it serves as a gang fortress, where gang members congregate, deal drugs, and engage in other gang activity. Pursuant to the property abatement, gang members and associates are subject to stay away

131. *Id.*

132. *Id.* at 64 (finding unconstitutionally vague an ordinance prohibiting gang members from loitering that failed to enumerate a comprehensive definition of "loiter" and left determination of gang membership to ad hoc police discretion). For a discussion of the mechanism at issue in *Morales* and relevant critiques, see generally Lawrence Rosenthal, *Gang Loitering and Race*, 91 J. CRIM. L. & CRIMINOLOGY 99 (2000); Kim Strosnider, *Anti-Gang Ordinances After City of Chicago v. Morales: The Intersection of Race, Vagueness Doctrine, and Equal Protection in the Criminal Law*, 39 AM. CRIM. L. REV. 101 (2002); Tracey L. Meares & Dan M. Kahan, *The Wages of Antiquated Procedural Thinking: A Critique of Chicago v. Morales*, 1998 U. CHI. LEGAL F. 197 (1998); Albert W. Alschuler & Stephen J. Schulhofer, *Antiquated Procedures or Bedrock Rights?: A Response to Professors Meares and Kahan*, 1998 U. CHI. LEGAL F. 215 (1998); Debra Livingston, *Gang Loitering, the Court, and Some Realism About Police Patrol*, 1999 SUP. CT. REV. 141, 162 (1999). The U.S. Supreme Court has not considered gang injunctions, but, as imposed in California, it is clear that they are distinguishable from the Chicago ordinance with respect to the constitutional infirmities considered in *Morales*. See Walston, *supra* note 123, at 51–53. *But see* Young, *supra* note 123, at 1004.

133. See generally Meares & Kahan, *supra* note 132 (primarily discussing anti-gang ordinances, but drawing connections among other strategies, including gang injunctions); Strosnider, *supra* note 132.

134. The future viability of the gang injunction is not clear, as several municipalities have experienced significant community resistance to their deployment. Civil rights organizations, such as the American Civil Liberties Union, continue to challenge the mechanisms as unconstitutional. At least partially in response to such criticism, in 2017, the city of Los Angeles removed more than two thousand individuals from its various gang injunctions. James Queally, *Thousands freed from L.A. gang injunctions that controlled their movements, friendships, even dress choices*, L.A. TIMES (Dec. 12, 2017), <https://lat.ms/2QPCA2U>.

135. Cheryl L. Maxson, Karen Hennigan, David Sloane & Kathy A. Kolnick, *Can Civil Gang Injunctions Change Communities? A Community Assessment Of The Impact Of Civil Gang Injunctions* 3 (2004), <https://www.ncjrs.gov/pdffiles1/nij/grants/208345.pdf> (citing Deanne Castorena, *The History Of The Gang Injunction In California* (1998) (unpublished report by the Hardcore Gang Division, Office of the District Attorney, County of Los Angeles)). The program in place in Southern California is described in Jonathan Cristall & Liora Forman-Echols, *Property Abatements—The Other Gange Injunction: Project T.O.U.G.H.*, NAT'L GANG CTR. BULL. (Sept. 2009), <https://www.nationalgangcenter.gov/content/documents/project-tough.pdf>.

orders prohibiting them from returning to the property, while owners, tenants and managers are required to take comprehensive action to prevent gang activity.¹³⁶ If the nuisance is not abated, the property may be seized and sold.¹³⁷

Within a decade, single situs abatements had given way to the much broader injunctive relief afforded by the gang injunction.¹³⁸ This distinctive feature of the gang prevention and criminal law enforcement arsenal takes the form of a standard injunction.¹³⁹ In their standard form, gang injunctions claim that the conduct of named gangs, as unincorporated entities—not specific individuals¹⁴⁰—constitutes a public nuisance under California law, which has both civil and penal components.¹⁴¹ As a civil offense, “[a]nything which is injurious to health . . . or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property” constitutes a nuisance.¹⁴² A nuisance becomes public when it “affects at the same time an entire community or neighborhood, or any considerable number of persons,”¹⁴³ and it becomes criminal when it has a distinctively public quality.¹⁴⁴ The broad nuisance abatement actions have been deployed

136. For example, the owner may be required to install security systems or make physical alterations to the property (like increasing lighting or installing fences) to prevent gang activity and, in leased property, implement changes to management, tenant-screening proceedings. If necessary, tenant evictions may be ordered.

137. Jonathan Cristall & Liora Forman-Echols, *Property Abatements—The Other Gang Injunction: Project T.O.U.G.H.*, NAT’L GANG CTR. BULL. 4–6, 10–12 (Sept. 2009), <https://www.nationalgangcenter.gov/content/documents/project-tough.pdf>. The technical process of property abatement is more complicated, and sale and seizure is a remedy of last resort, that follows the closure of the property and imposition of liens, and other intermediate sanctions designed to incentivize abatement.

138. O’DEANE, *supra* note 39, at 441–49.

139. Cheryl L. Maxson et al., *For the Sake of the Neighborhood? Civil Gang Injunction as a Gang Intervention Tool in Southern California*, in *POLICING GANGS AND YOUTH VIOLENCE* 239, 245–49, 260–62 (Scott H. Decker ed., 2003) [hereinafter Maxson et al., *Sake of the Neighborhood*] (detailing the ways the mechanism defies simple categorization in the gang intervention typology proposed by Spergel and Curry, *supra* note 79).

140. A key component of gang injunctions is their reliance on California’s “time-honored equitable practice applicable to labor unions, abortion protestors or other identifiable groups” of pursuing equitable remedies against identifiable groups (regardless of their incorporation status) because “such groups can act only through the medium of their membership.” To effect this principle, at least some specific gang members are named as representatives of the named gang. Then, the gang, through those representatives (and other gang member who steps forward to speak for the gang), is given the opportunity to challenge the injunction, generally, and its particular provisions, specifically, according to procedures applicable to any other civil injunction. The named gang members may also challenge their inclusion in the proposed injunction. *People ex rel. Gallo v. Acuna*, 929 P.2d 596, 617 (Cal. 1997).

141. CAL. CIV. CODE §§ 3479–3480 (West 2018).

142. *Id.* § 3479 (specifically including drug dealing).

143. *Id.* § 3480.

144. CAL. PENAL CODE § 370 (West 2018).

against gangs to target conduct not otherwise prohibited in California Penal Code,¹⁴⁵ and the broad definition was crafted to flexibly cover the full range of behaviors in which gang members might engage publicly. In addition to unlawful and criminal conduct, gang injunctions typically enjoin:

- (1) standing, sitting, walking, driving, gathering, bicycling or otherwise appear in the public view with any known gang member;
- (2) possessing tools or objects “capable” of defacing real or personal property (i.e. pens);
- (3) blocking the free passage of any person or vehicle;
- (4) confronting, intimidating, harassing, annoying, provoking any residents or patrons or visitors to the target area;¹⁴⁶
- (5) knowingly being present in a vehicle found to have contraband, drugs or illegal weapons;¹⁴⁷
- (6) acting as a lookout and signaling in any manner to other persons the approach of the police;
- (7) using words, phrases, physical gestures or symbols (i.e. gang signs), or engaging in other forms of communication that describe or refer to the gang;
- (8) wearing gang clothes; and
- (9) making loud noise of any kind, including yelling or loud music, at any time of day or night.¹⁴⁸

Gang injunctions have been deployed with considerable variation.¹⁴⁹ Some jurisdictions use injunctions to reduce the number of gang members on the street at any given moment by performing gang sweeps.¹⁵⁰ Other jurisdictions report that police officers “get more mileage from the gang

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

146. Notice that since these are civil actions, many provisions, like this one, require no *mens rea*. *Id.* at 71.

147. LOS ANGELES CITY ATTORNEY’S OFFICE: CRIMINAL AND SPECIAL LITIGATION BRANCH, GANG INJUNCTION GUIDELINES (2007) at 27 http://www.njcn.org/uploads/digital-library/resource_1317.pdf.

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

149. *See, e.g. Management Audit of the Civil Gang Injunctions, in 2003–2004 LOS ANGELES COUNTY CIVIL GRAND JURY, FINAL REPORT 223–24 (2004)*, http://grandjury.co.la.ca.us/gjury03-04/LACGJFR_03-04.pdf (describing differential deployment between the city and county of Los Angeles).

150. *See O’DEANE, supra* note 39, at 71 (describing the systematic “catch and release” of gang members).

injunctions by using them as a negotiating tool to gain information on the streets.”¹⁵¹ Gang injunctions also impose indirect but significant practical consequences on injunctees that are unrelated to the enforcement of the gang injunction. Being enjoined, for example, is included on a standard background check,¹⁵² which limits injunctees’ access to legitimate employment and both public and private housing.

Gang injunctions are intuitively compelling. They are responsive to the characteristics of the historical moment in which they arose that rendered conventional law enforcement strategies impracticable and relatively cost effective. Further, the savings associated with them are reinforced by the heightened community surveillance that gang injunctions permit. Moreover, proponents claim, this heightened surveillance creates deterrent reverberations at no additional enforcement cost. Through that heightened surveillance, which is explicitly sanctioned for injunctees and implicitly supported for the wider safety zone population, law enforcement is able to bypass much of the constitutional criminal procedural strictures and redeploy the flexibility and discretion to strategically target delinquent youth for the types of behavior that was the object of historical order-maintenance policy.¹⁵³ Gang injunctions are also responsive to the “tough on crime” political climate by communicating absolute intolerance for gangs and by narrowly circumscribing the liberty of perceived criminals.¹⁵⁴

The gang injunction example is apt for the present discussion. However, the full range of traditional law enforcement techniques and special initiatives that reflect popular legal consciousness centers on gangs as wholly criminal institutions engaged in terminally violent conduct to advance financial objectives. The force of this perspective can be seen in the response to legal challenges to these types of innovations. The successful challenge to Chicago’s gang loitering ordinance rested on its focus on loitering, which is by definition an innocuous act and by implication not a tool of gang terrorists.¹⁵⁵

In contrast, California-style gang injunctions survive First Amendment challenges because the expression and association of gangs has the illicit purpose of furthering a criminal enterprise, which falls into the constitutionally unprotected category of behaviors that do not express some political, social, economic, educational, religious, or cultural

151. *Id.*

152. See Lindsay Crawford, Comment, *No Way Out: An Analysis of Exit Processes for Gang Injunctions*, 97 CALIF. L. REV. 161, 179–80 (2009).

153. See Walston, *supra* note 123, at 51.

154. See *id.* at 53.

155. *City of Chicago v. Morales*, 527 U.S. 41, 50 (1999).

viewpoint and which are not conferred First Amendment protection.¹⁵⁶ Gang association and speech is criminal association and speech.

The Equal Protection clause of the Constitution prohibits invidious distinction based on protected characteristics, like race. Challenges to gang injunctions on this ground are untenable because gangs expressly enjoined because of their proven record of causing criminal public nuisances, not because of their race or status.¹⁵⁷ Again, definitionally, gangs are criminal.¹⁵⁸

At least with respect to gang members, then, the gang injunction should be expected to heighten the risks posed by and exacerbate the impact of vulnerability. Gang injunction assessments have born out this expectation. Beth Caldwell concluded that injunctions reinforce gang membership by exacerbating key marginality indicators across different scales.¹⁵⁹ That is, gang injunctions render injunctees less able to access mainstream, legitimized mechanisms of resilience, like lawful employment. Similarly, Joan Howarth demonstrates that gang injunctions distinguish antagonistic categories of gang members versus community members, which are completely separated and in opposition. These silos, in turn, solidify gang exclusion from the community.¹⁶⁰ For both Caldwell and Howarth, gang injunctions excise actual and suspected gang members from communities in ways that further destabilize mainstream resilience development and distribution,¹⁶¹ while the concomitant heightened community surveillance perpetuates rather than undermines social influence factors that contribute to gang emergence.¹⁶²

B. *Paid Injunctions*

This article maintains that street gangs are best understood as engaged in transgressive property creation and reinterpretation that

156. Walston, *supra* note 123, at 69.

157. Bernard E. Harcourt, *Rethinking Racial Profiling: A Critique of the Economics, Civil Liberties, and Constitutional Literature, and of Criminal Profiling More Generally*, 71 U. CHI. L. REV. 1275, 1276 (2004); O'DEANE, *supra* note 39, at 157–58.

158. See also 2015 NATIONAL GANG REPORT, *supra* note 4, at 11 (defining street gangs as “criminal organizations that formed on the street and operate in neighborhoods”).

159. Beth Caldwell, *Criminalizing Day-to-Day Life: A Socio-Legal Critique of Gang Injunctions*, 37 AM. J. CRIM. L. 241, 262-70 (2010).

160. Joan W. Howarth, *Toward the Restorative Constitution: A Restorative Justice Critique of Anti-Gang Public Nuisance Injunctions*, 27 HASTINGS CONST. L.Q. 717, 734-36 (2000).

161. In the general criminal context, Meares has problematized the tendency of incarceration to produce the same results. See, e.g., Tracey L. Meares, *Place and Crime*, 73 CHI.-KENT L. REV. 669, 699 (1998); Tracey L. Meares, *Social Organization and Drug Law Enforcement*, 35 Am. Crim. L. Rev. 191, 223-26 (1998).

162. Terence R. Boga, *Turf Wars: Street Gangs, Local Governments, and the Battle for Public Space*, 29 HARV. C.R. - C.L. L. REV. 477, 460-61 (1993).

provides alternative sources of resilience both to gang members and, often, to the communities in which gangs are sited. It would be possible to take this recasting of street gangs using the vulnerability heuristic as an opportunity to reject the consensus that gangs are bad. However, this article follows a less radical path.

[W]hen vulnerability is understood as a universal constant, the question is not, “Who is more or less vulnerable?” – because again, we are all vulnerable. The question instead becomes, “Who is more or less *resilient* and how did they get that way?” Understanding this inequality of resilience is at the heart of vulnerability theory, because it is through social institutions . . . that we develop our resilience over the course of our lives. Through the lens of the liberal legal subject, a lack of resilience can be deemed an individual failing. *You* made a mistake But through the lens of a vulnerable legal subject, a lack of resilience most often is a function of unequal access to certain societal structures and/or unequal allocations of privilege and power within those structures.¹⁶³

Thus, even accepting the proposition that gangs are bad, what this reframing should mean for an anti-gang strategy remains a relevant inquiry.

As sketched above, gang injunctions prohibit members of specified gangs from engaging in a wide range of otherwise lawful activities through which gangs generate the property interests that provide resilience to gangs. So, wearing clothes in gang colors, appearing in public with a gang member, carrying a writing utensil, and many other acts are prohibited and effectively criminalized by gang injunctions.¹⁶⁴ Recall, the antecedents to gang membership and the situs of gangs is linked to the inadequacy of traditional mechanisms for building resilience for gang members and the communities in which they live.¹⁶⁵ Gangs confer on their members both privilege and power. They do this through the deployment, use, and even creation of identity property—wearing their colors, claiming territory, and displaying gang symbols.

Gang injunctions follow, systematically dismantling gangs and stripping gang members of the resilience fostered by the gang and to which the state has failed to provide access. That gang injunctions decrease resilience can be inferred from available empirical analyses of gang

163. Stu Marvel, *Vulnerability Theory and Sexual Assault on Campus* (unpublished manuscript, on file with author); see generally Stu Marvel, *Response to Tuerkheimer – Rape on and off Campus, The Vulnerable Subject of Rape Law: Rethinking Agency and Consent*, 65 EMORY L. J. 2035 (2016) (providing support for quoted material).

164. See *supra* notes 138 to 152 and accompanying text.

165. See *supra* notes 159 to 162 and accompanying text.

injunctions.¹⁶⁶ Qualitative research suggests that gang injunctions also strip non-member inhabitants of gang territory of resilience.¹⁶⁷

Using a vulnerability lens, through which the obligation of the state is to support the development of resilience, rather than strip or impede it, there is no defense of the gang injunction as it has been typically advanced. As a social justice project that mandates the building of resilience, vulnerability theory demands an alternative to gang injunctions. It requires the state to destabilize (or destroy) one mechanism of resilience, while replacing it with other mechanisms of resilience that provide a “better” package of resources and relationships.

One such alternative is the compensated gang injunction.¹⁶⁸ This legal tool—by which the restrictions imposed by gang injunctions are extracted only upon compensation—can diminish the collateral criminality of gangs, while opening access to mainstream sources of resilience. In such a model, local governments obtain injunctions against a named street gang, specifying gang-related behavior that has created a nuisance within the jurisdiction.¹⁶⁹ In exchange for the injunction, however, the local government is required to compensate the injunctees.

Simple monetary compensation would be largely consistent with the claims developed above. Financial capital provides access to almost the full range of resilience mechanisms contemplated within vulnerability and property discourse, and from which the scholarly consensus suggests, gang members are excluded. The one reported case that employed a compensated injunction¹⁷⁰ (and each of the three subsequent elaborations thereof)¹⁷¹ contemplated monetary relief. Compensation in-kind, which is the core of the paid gang injunction model advocated here, is more consistent with those perspectives. It also more pragmatic.¹⁷² So, in

166. Maxson et al., *Sake of the Neighborhood*, *supra* note 139, at 254–57; Cheryl L. Maxson, *Civil Gang Injunctions: The Ambiguous Case of the National Migration of a Gang Enforcement Strategy*, in *AMERICAN YOUTH GANGS AT THE MILLENNIUM* 375, 378–79 (Finn-Aage Esbensen et al. eds., 2004) [hereinafter Maxson, *The Ambiguous Case*].

167. Lua K. Yuille, *Dignity Takings in Gangland’s Suburban Frontier*, 92 *CHI.-KENT L. REV.* 793, 803 (2018).

168. Lua K. Yuille, *Blood In, Buyout: A Property & Economic Approach to Street Gangs*, 2015 *WISC. L. REV.* 1049, 1122–1125 (2015).

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

170. See *Spur Indus. v. Del E. Webb Dev. Co.*, 494 P.2d 700, 705 (1972) (en banc).

171. Jeff L. Lewin, *Compensated Injunctions and the Evolution of Nuisance Law*, 71 *IOWA L. REV.* 775, 831 (1986); Edward Rabin, *Nuisance Law: Rethinking Fundamental Assumptions*, 63 *VA. L. REV.* 1299, 1343–47 (1977); Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 *U. CHI. L. REV.* 681, 779–81 (1973).

172. The suggestions here are pragmatic because they recognize that sometimes unwanted behavior can become so entrenched that manipulated social norms can be as

exchange for refraining from gang activity pursuant to the injunction, enjoined gang members would be offered pathways into the mainstream capital and property system from which they are marginalized and to which they have built an alternative. The idea of compensating individuals to engage in desirable behaviors is wholly consistent with the economic structures and foundations of many societies, and it has proven successful in many areas where such commodification is originally interpreted unfavorably.

For example, gaining increasing attention within the fields of development and poverty economics are “conditional cash transfer” programs in which government largesse is earned through attending school, receiving vaccinations, or partaking in job training programs.¹⁷³ Empirical and qualitative studies of these programs implemented in many countries have concluded they are largely successful.¹⁷⁴

The key features of a “service” model of compensation for reducing gangs have also already been implemented in the work of various institutions and organizations. In exchange for a commitment to remain uninvolved in gang activity, these organizations’ constituents gain access to a menu of capital producing services, including job training, education, employment or employment counseling, mental health services, life counseling, tattoo removal, and legal services.¹⁷⁵

For example, the city of Richmond, California, has experimented with the key conceptual features of a paid gang injunction. Through its the Operation Peacemaker Fellowship,¹⁷⁶ the city’s Office of Neighborhood Services began a street outreach program to identify youth, aged 16-25, responsible for violent crime in the city.¹⁷⁷ Those youth were then offered a fellowship in which they received counseling, social services, a job, opportunities to travel, and up to a \$1,000 a month for nine months in exchange for developing a “life map,” staying in contact with the program every day, and refraining from criminal activity.¹⁷⁸ The program has

powerful as changing the law. Jeffrey J. Rachlinski, *Symposium on Law, Psychology, and the Emotions: The Limits of Social Norms*, 74 CHL-KENT L. REV. 1537, 1537–38 (2000) (“[G]aining control over dysfunctional societies might depend more upon using or manipulating social norms than upon enforcing the law”). The model of the compensated gang injunction aims to create avenues for changing capital availability, which destabilizes the structure of the unwanted social norms.

173. See, e.g., *Evaluations*, J-PAL, [https://www.povertyactionlab.org/evaluations/?f\[0\]=field_policy_goal%3A6753](https://www.povertyactionlab.org/evaluations/?f[0]=field_policy_goal%3A6753) (cataloging 44 economic studies of such programs).

174. *Id.*

175. See *infra* notes 177 to 187 and accompanying text.

176. *More about ONS Strategic Initiatives*, CITY OF RICHMOND, CAL., <http://ca-richmond.civicplus.com/2410/More-about-ONS-Strategic-Initiatives> (last visited Feb. 17, 2019).

177. *Id.*

178. *Id.*

received significant media attention because of its cash payments, but its success remains untested.¹⁷⁹ International implementation of a program, with some of the conceptual features of the paid gang injunction, is also untested. In 2014, the English coffee company, Kenco, launched “Coffee vs. Gangs.”¹⁸⁰ The very well publicized program¹⁸¹ offers Hondurans, aged 16 to 28, a training course taught by agricultural and business experts designed to help them become independent coffee farmers in Honduras’ burgeoning coffee industry.¹⁸²

Presaging the Richmond and Kenco experiments, Los Angeles’ Homeboy Industries is the longest-running, most well-known, and successful anti-gang compensation initiative.¹⁸³ The organization, which is also the nation’s largest gang intervention and reintegration program, targets former gang members with the most barriers to mainstream employment, including extensive and visible tattoos, mental health impediments, and significant or recent felony records.¹⁸⁴ Upon acceptance to the program, the individual is assigned a case manager with whom he develops a service plan that reflects the gang member’s objectives and the services in which he will participate to accomplish them.¹⁸⁵ Depending on the incoming skill level of the individual, he may receive a remunerated job-training position in one of Homeboy Industries economic enterprises with employers willing to hire Homeboy Industries’ difficult-to-employ population.¹⁸⁶ During their participation in the program, which is targeted to last approximately eighteen months, participants also receive free social services, including tattoo removal, parenting classes, high school equivalency preparation, substance abuse counseling, clinical and group mental health programming, language and life coaching, and legal assistance.¹⁸⁷

179. *Id.*

180. Wendy Hackshaw, *Coffee vs Gangs*, LATINO REBELS (June 30, 2016), <http://www.latinorebels.com/2016/06/30/coffee-vs-gangs/>.

181. The company hosts social media pages dedicated to Coffee vs. Gangs, maintains sponsored portals in UK news media outlets, and runs enthralling television campaigns describing its efforts. *Id.*

182. Will Green, *Kenco’s Coffee vs Gangs project just part of company’s efforts to protect global supply chain*, SUPPLY MANAGEMENT (May 20, 2015), <https://tinyurl.com/y33lbr79>.

183. See *Why We Do It*, HOMEBOY INDUSTRIES, <https://www.homeboyindustries.org/why-we-do-it/> (providing more information about the organization); see also LEAP, *supra* note 2, at 206–07, 210–13. See generally Celeste Fremon, *G-Dog and the Homeboys*, L.A. TIMES, Aug. 11, 1991, reprinted in THE MODERN GANG READER, *supra* note 6, at 325 (discussing the earlier gang intervention work of Homeboy’s founder, Gregory Boyle).

184. HOMEBOY INDUSTRIES, *supra* note 183.

185. *Id.*

186. *Id.*

187. *Id.*

Homeboy Industries reports that two-thirds of its “clients/trainees” transition into full-time, mainstream employment,¹⁸⁸ and disassociate with at least the criminogenic element of gangs. Existing research indicates that full-time, legitimate employment at any income level is associated with decreases in and cessation of active gang involvement.¹⁸⁹ Individuals may continue to identify with a gang, but they reduce or stop their engagement in criminal, tortfeasance, and otherwise objectionable gang conduct that is the overarching concern of host communities. That evidence is supported by anecdotal reports that gang members profess a desire and willingness to refrain from entrepreneurial gang activity when comparable legitimate economic activities are available. Since economic analyses of gang finances indicate that the average gang member can earn no more than \$20,000 annually from gang-associated economic activities,¹⁹⁰ licit employment at this approximate income level is expected to result in the termination of the types of gang conduct with which gang injunctions are concerned, as well as the associated criminal conduct.

The operation of Homeboy Industries also appears responsive to the enriched understanding of gangs advanced here and to the demands of vulnerability theory. Rather than further marginalizing gang members from mainstream markets, Homeboy Industries attempts to fill the same economic, social, and cultural capital gaps that generate gangs and create a bridge to mainstream networks and identity property access for its service population. By engaging gang members with respect to the value of their property, the process becomes community-affirming. Instead of delegitimizing everything about the gang member, the community can acknowledge the settlements gangs have made with respect to their interests, and then give them a fundamental role in determining how to accommodate or dispose of those interest in light of countervailing community interests.

This article claims that the acquisition of resilience fostering identity property through the means available to an individual, even if unlawful, is not necessarily a moral failing of that individual.¹⁹¹ Instead, it is part of the natural propensity or necessity to pursue identity property as a means to confront one’s vulnerability. This claim is buttressed by the fact that successful participants use their access to mainstream capital to pursue traditional avenues of identity property.

188. *Id.*

189. Levitt & Venkatesh, *supra* note 77, at 759–60. *But see* Decker & Lauritsen, *supra* note 95, at 69 (identifying violence as a significant factor motivating gang exit).

190. Levitt & Venkatesh, *supra* note 77, at 756.

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

Both theoretical and practical evaluations indicate that a compensated gang injunction is a feasible and desirable alternative to the gang injunction model of gang *intervention* and *re-integration*. That is, the proposal remedies an observed exclusion from sanctioned social institutions that promote the accumulation of capital that foster resilience. However, they do nothing to prevent the capital deficits that result in gang formation. Vulnerability theory and its demand for a responsive state that affirmatively works to build and support social institutions that act as resilience mechanisms requires such a comprehensive anti-gang strategy.

VI. CONCLUSION

On its surface, this article is about street gangs, which occupy a uniquely vilified position in American popular consciousness. Notwithstanding the availability of a rich body of sociological, criminological, and legal literature concerned with issues at the center and in the penumbra of the phenomena, often ostensibly aimed at harnessing intellectual and emotional sympathy, the members of gangs remain an almost universally disdained population. Such aversion has impelled a criminological approach to gangs that ignores their fundamental role.

In contrast, this article recognized that gangs are, essentially, networked institutions of resilience that arise within alternative markets, where mainstream institutions and systems have failed to provide opportunities to create enough identity property to adequately inure gang members and their communities to their vulnerability. Then, it suggested that the paid injunction constitutes an appropriate satisfaction of the responsive state's duty to provide gang members with the assets or tools to be resilient when their vulnerability is made manifest.

In telling its street gang story, the article illustrates the central role of property in the concept of resilience. Resilience is the accumulation of resources that permit individuals to cope with their vulnerability. This idea—that the accumulation of resources (i.e. capital or property) allows people to cope with their vulnerability—is central to a broad range of property justifications.

In its interstices, this article develops some more broadly applicable lessons. The vulnerability lens permits a deeper and more authentic understanding of how people engage with each other and their communities. While vulnerability is inextricable from the human condition, so too is the universality and constancy of the human endeavor to mitigate vulnerability. Gangs may be engaged in transgressive behavior, but they are not pathological. They are responsive to need to build mechanisms of resilience where few or none exist. This idea also flows directly from numerous property perspectives. For example, property as

freedom, property as personhood, property as entrance, property as relative status—from any of these perspectives, what gangs do is create sophisticated networks to respond to vulnerability faced by gang members.

What vulnerability theory adds to these varied contributions is its demand for a responsive state. Even communitarian property perspectives recognize property's commitment to stability, immobility, and stasis¹⁹²—”reflexively resistant to change, preserving as it does the realm of settled expectation.”¹⁹³ The responsive state's affirmative obligations open new appropriate avenues for state intervention.

192. At the helm of the contemporary discussion of this ideal are Thomas W. Merrill & Henry E. Smith. *See, e.g.*, Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1852–55 (2007); Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 14–16 (2000). For an overview of this perspective's critics, see, for example, Nestor M. Davidson, *Property's Morale*, 110 MICH. L. REV. 437, 444 (2011).

193. Nestor M. Davidson & Rashmi Dyal-Chand, *Property in Crisis*, 78 FORDHAM L. REV. 1607, 1659 (2010).