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

Lua Kamál Yuille

Follow this and additional works at: https://elibrary.law.psu.edu/pslr

Part of the Law Commons

Recommended Citation
Available at: https://elibrary.law.psu.edu/pslr/vol123/iss2/4

This Article is brought to you for free and open access by the Law Reviews and Journals at Penn State Law eLibrary. It has been accepted for inclusion in Penn State Law Review by an authorized editor of Penn State Law eLibrary. For more information, please contact ram6023@psu.edu.
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

*Associate Professor, University of Kansas School of Law. Various drafts and pieces of this article, benefitted from the comments and reactions of participants in the 7th Annual Meeting of the Association of Law, Property, and Society (ALPS), a Workshop on Vulnerability and Social Justice, Property Works-in-Progress 2016, and the inaugural Margaret E. Montoya Scholarship Retreat (including the inestimable Margaret E. Montoya, herself). Thanks to F. E. Guerra-Pujol and my research assistants, Kelsey Treuil and Elizabeth D. Williams. I also thank the actual and imputed gang members, whose experiences motivated this line of work and who graciously participated in my empirical research study that significantly influenced this theoretical work. I bear, of course, all responsibility for any deficiencies. FTJ. JGY.
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.

**Table of Contents**

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>PROLOGUE</td>
<td>........................................................................................................</td>
<td>465</td>
</tr>
<tr>
<td>I.</td>
<td>INTRODUCTION ..................................................................................</td>
<td>465</td>
</tr>
<tr>
<td>II.</td>
<td>STREET GANGS IN POPULAR LEGAL CONSCIOUSNESS ...................................</td>
<td>468</td>
</tr>
<tr>
<td></td>
<td>A. The Liberal Legal Subject .......................................................</td>
<td>469</td>
</tr>
<tr>
<td></td>
<td>B. The Pathological Gang Subject ................................................</td>
<td>471</td>
</tr>
<tr>
<td>III.</td>
<td>THE VULNERABLE SUBJECT IN A STREET GANG .........................................</td>
<td>472</td>
</tr>
<tr>
<td></td>
<td>A. The Vulnerable Subject ..........................................................</td>
<td>473</td>
</tr>
<tr>
<td></td>
<td>B. Gangs as a Product of Vulnerability ........................................</td>
<td>475</td>
</tr>
<tr>
<td></td>
<td>C. Resilience as the Demand of Vulnerability Theory ..........................</td>
<td>475</td>
</tr>
<tr>
<td>IV.</td>
<td>THE FUNDAMENTAL ROLE OF PROPERTY IN GANG RESILIENCE ..........................</td>
<td>477</td>
</tr>
<tr>
<td></td>
<td>A. Gangs as Capital Generators ....................................................</td>
<td>477</td>
</tr>
<tr>
<td></td>
<td>B. Property Corollaries to Vulnerability Theory ..................................</td>
<td>481</td>
</tr>
<tr>
<td></td>
<td>C. Property &amp; Resilience ..............................................................</td>
<td>484</td>
</tr>
<tr>
<td>V.</td>
<td>PAID INJUNCTIONS AS RESILIENCE ....................................................</td>
<td>485</td>
</tr>
<tr>
<td></td>
<td>A. Prevailing Anti-Gang Strategies ...............................................</td>
<td>485</td>
</tr>
<tr>
<td></td>
<td>B. Paid Injunctions .........................................................................</td>
<td>491</td>
</tr>
<tr>
<td>VI.</td>
<td>CONCLUSION ...................................................................................</td>
<td>497</td>
</tr>
</tbody>
</table>
“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 Holmes

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.

“How 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.

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. 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.

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. 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. Most of this experimentation has focused on variations on traditional policing, like the creation of specialized “gang units” within police departments and targeted heightened surveillance operations against gang leaders. However, 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.

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. 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. 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. 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


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

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” to inherent personal and institutional vulnerability. 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, are intractably pathological. The Federal Bureau of Investigation proclaims, “[t]hey poison our streets with drugs, violence, and all manner of crime.”

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).
Gang members are “brutal outlaws,” 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.” The people of this community are prisoners in their own homes . . . The area is an urban war zone. “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.”

“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.” 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.’

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.” The liberal subject offers an image of the


individual as *fungorum more*, sprung from the earth fully mature, autonomous, self-sufficient, free, and independent. 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,” 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—howsoever framed—is, therefore, perceived as individual failure. 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.”

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. 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.

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 Hobbes, Philosophical Rudiments Concerning Government and Society* (1651), *reprinted in 2 The English Works of Thomas Hobbes of Malmesbury* 1, 109 (William Molesworth ed., 1841).


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 deindustrialization—distorted established gang attrition patterns associated with the end of adolescence. 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.

Today emblematized by the Crips and Bloods, originating in Los Angeles, or the Latin Kings and Vice Lords, born in Chicago, these “persistent” gangs are, moreover, comprised predominately of members...
who are neither White nor proto-White. Instead, the contemporary gang is perceived as being “made up largely of darker-hued ethnic groups, especially African Americans and Latino Americans.”

The entrepreneurial and fraternal characteristics of gangs mimic closely the expectations of the responsibilization 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.” 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.

III. THE VULNERABLE SUBJECT IN A STREET GANG

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

---

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, 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.”

A. The Vulnerable Subject

Vulnerability theory is an evolving paradigm introduced by Martha Albertson Fineman. 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, 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”—is a fundamental and universal aspect of the human condition.

This version of vulnerability does not describe merely human susceptibility to harm or danger. 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.


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. 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. 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.

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. 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.”

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].

subset of society. 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.” The universal vulnerability of humans is what necessitates “the formation of families, communities, associations, and even political entities and nation-states.” 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.”

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.

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

---

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.
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. 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.

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

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

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. 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.

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). Social disorganization posits that gangs form
when social institutions responsible for transmitting societal norms are
weak. “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
Bourdieuian 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
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,

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. 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. The common insight of these viewpoints is their diagnosis of the disjunction between mainstream sources of capital and the alternatives produced by gangs. “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. 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. Gangs respond to these deficits by developing distinctive gang vernaculars 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. 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.”

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. 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. The borders of a gang’s geographic territory are clearly charted by its distinctive graffiti. 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. 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. Within secured territories, 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.
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. 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. 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, Charles A. Reich described property as “guard[ing] the troubled boundary between individual man and the state,” concluding that it facilitated the individual’s ability to control his own life. 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.

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.


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

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

---

100. Radin, *Property and Personhood*, supra note 100, at 957.
103. Id.
of Robinson Crusoe property rights play no role.” However, Peñalver’s insight advances a different proposition: property is “an institution that binds individuals together into normative communities.” Peñalver calls this idea “property as entrance.”

The normative underpinnings of property as entrance are anchored in an Aristotelian community theory of property advanced by Peñalver and Gregory Alexander. 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,” a rich concept that “must include at least the capacity to make meaningful choices among alternative life horizons.” That capacity justifies the value and effort invested in individual autonomy. In the communitarian framework, property facilitates access to the human networks that allow an individual to become fully human.

Such community access, however, is mediated by the socio-cultural meanings attached to property. 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

109. Id. passim.
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. \footnote{116}{See generally Nestor M. Davidson, *Property and Relative Status*, 107 Mich. L. Rev. 757 (2009).} 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. \footnote{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.} 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. \footnote{118}{Davidson, *supra* note 116, at 771–74.} The type, volume, and composition of an individual’s ownership situates that individual horizontally and vertically in the social order. \footnote{119}{This function clearly correlates to the Bourdieusian 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.} 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 gangs 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.
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 have 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 catalyzed the changes in street gangs that earned their contemporary reputation 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. At the same historical moment, so-called “tough on crime” law enforcement models were proving inadequate in a legal context that had disapproved of


122. That is, the contemporary political and economic priorities—which Hila Keren, supra note 30, now describes as neoliberalism’s responsibilization 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.\textsuperscript{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,\textsuperscript{124} created specialized “gang units” within police departments, and targeted heightened surveillance operations against gang leaders.\textsuperscript{125} However, political actors also turned to civil legal mechanisms to combat the growing, intractable menace.\textsuperscript{126}

Chicago’s juvenile street gangs were the first to be studied systematically\textsuperscript{127} and remain a mine for important data on the functioning of contemporary gangs.\textsuperscript{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,\textsuperscript{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.\textsuperscript{130} Failure to

\textsuperscript{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 \textit{Stan. L. Rev.} 1, 8 (2004); Gregory S. Walston, \textit{Taking the Constitution at Its Word: A Defense of the Use of Anti-Gang Injunctions}, 54 \textit{U. Miami L. Rev.} 47, 51–53 (1999). But see Ryan Young, \textit{Sharpen the Blade: Void for Vagueness and Service of Process Concerns in Civil Gang Injunctions}, 40 \textit{McGeorge L. Rev.} 1001, 1004 (2009); Sides, supra note 33, at 583–60; David R. Truman, \textit{The Jets and Sharks are Dead: State Statutory Responses to Criminal Street Gangs}, 73 \textit{Wash. U. L.Q.} 683, 686–90 (1995).

\textsuperscript{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 \textit{Cal. Penal Code} §§ 186.21, 654 (West 2018).


\textsuperscript{126}. \textit{Id.}

\textsuperscript{127}. \textit{Id.}

\textsuperscript{128}. See generally Thrasher, supra note 37.


\textsuperscript{130}. City of Chicago v. Morales, 527 U.S. 41, 47 n.2 (1999).
dispersing on command could result in arrest, fines up to $500, and six month’s imprisonment.\textsuperscript{131} The U.S. Supreme Court struck down the ordinance in 1999;\textsuperscript{132} however, its passage and the wave of emulation it prompted are illustrative of local government perspectives and approaches.\textsuperscript{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.\textsuperscript{134} The path to the gang injunction began with “single situs” property abatements,\textsuperscript{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

\begin{enumerate}
\item \textit{Id.}
\item 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.
\item 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, \textit{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.
\end{enumerate}
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 Gange 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.


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).


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

146. Notice that since these are civil actions, many provisions, like this one, require no mens rea. Id. at 71.
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
153. See Walston, supra note 123, at 51.
154. See id. at 53.
viewpoint and which are not conferred First Amendment protection.\textsuperscript{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.\textsuperscript{157} Again, definitionally, gangs are criminal.\textsuperscript{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.\textsuperscript{159} That is, gang injunctions render injunctionees 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.\textsuperscript{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,\textsuperscript{161} while the concomitant heightened community surveillance perpetuates rather than undermines social influence factors that contribute to gang emergence.\textsuperscript{162}

\textbf{B. Paid Injunctions}

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

\begin{itemize}
  \item \textsuperscript{156} Walston, supra note 123, at 69.
  \item \textsuperscript{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”).
  \item \textsuperscript{161} In the general criminal context, Meares has problematized the tendency of incarceration to produce the same results. See, e.g., Tracey L. Meares, \textit{Place and Crime}, 73 CHI.-KENT L. REV. 669, 699 (1998); Tracey L. Meares, \textit{Social Organization and Drug Law Enforcement}, 35 Am. Crim. L. Rev. 191, 223-26 (1998).
\end{itemize}
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.

When 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.  

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

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. 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. 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 injunction (and each of the three subsequent elaborations thereof) 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.


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.


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. Empirical and qualitative studies of these programs implemented in many countries have concluded they are largely successful.

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.

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, 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. 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. The program has powerful as changing the law. Jeffrey J. Rachlinski, Symposium on Law, Psychology, and the Emotions: The Limits of Social Norms, 74 CHI.-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.

174. Id.
175. See infra notes 177 to 187 and accompanying text.
177. Id.
178. Id.
received significant media attention because of its cash payments, but its success remains untested.\textsuperscript{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.”\textsuperscript{180} The very well publicized program\textsuperscript{181} 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.\textsuperscript{182}

Presaging the Richmond and Kenco experiments, Los Angeles’ Homeboy Industries is the longest-running, most well-known, and successful anti-gang compensation initiative.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{187}

\textsuperscript{179} Id.  
\textsuperscript{180} Wendy Hackshaw, \textit{Coffee \& Gangs}, \textsc{Latino Rebels} (June 30, 2016), http://www.latinorebels.com/2016/06/30/coffee-vs-gangs/.  
\textsuperscript{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. \textit{Id}.  
\textsuperscript{182} Will Green, \textit{Kenco’s Coffee vs Gangs project just part of company’s efforts to protect global supply chain}, \textsc{Supply Management} (May 20, 2015), https://tinyurl.com/y33lbr79.  
\textsuperscript{183} \textit{See Why We Do It}, \textsc{Homeboy Industries}, https://www.homeboyindustries.org/why-we-do-it/ (providing more information about the organization); \textit{see also} \textsc{LEAP, supra note 2}, at 206–07, 210–13. \textit{See generally} Celeste Fremon, \textit{G-Dog and the Homeboys}, \textsc{L.A. Times}, Aug. 11, 1991, \textit{reprinted in The Modern Gang Reader, supra note 6}, at 325 (discussing the earlier gang intervention work of Homeboy’s founder, Gregory Boyle).  
\textsuperscript{184} \textsc{Homeboy Industries, supra note 183}.  
\textsuperscript{185} \textit{Id}.  
\textsuperscript{186} \textit{Id}.  
\textsuperscript{187} \textit{Id}.
Homeboy Industries reports that two-thirds of its “clients/trainees” transition into full-time, mainstream employment, 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. Individuals may continue to identify with a gang, but they reduce or stop their engagement in criminal, tortfeasing, 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, 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. 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.
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 stasis—"reflexively resistant to change, preserving as it does the realm of settled expectation." The responsive state’s affirmative obligations open new appropriate avenues for state intervention.
