Tribal Judicial Institute

Overview of Anti-Gang Criminal Ordinances: Constitutionality

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By Maggie Eyre

I. Introduction and Background

Unfortunately, violence and crime that can be linked to gangs is on the rise.[1] Currently there are approximately 1.4 million gang members that belong to more 33,000 gangs in the United States.[2] Many of these gangs engage in criminal activity such as robbery, fraud, trafficking of drugs and guns, and prostitution rings, as well as white-collar crimes including identity theft and counterfeiting.[3] Many of these gangs are very sophisticated criminal organizations that are adapting to advancements in technology to commit illegal acts.[4] The National Gang Intelligence Center is reporting that more sophisticated gangs are also initiating changes in operations and activities to not draw the attention of law enforcement and avoid being charged under gang enhancement laws.[5]

According to the National Gang Intelligence Center, "gangs are responsible for an average of 48 percent of violent crimes in most jurisdictions and up to 90 percent in several others."[6] Major metropolitan and suburban areas consistently experience greater rates of gang-related violence than other communities within the United States.[7] There is also evidence that there is a migration of gang members from urban centers to more rural

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[1] The Federal Bureau of Investigation, 2011 National Gang Threat Assessment – Emerging Trends, The FBI (last visited July 26, 2012), http://www.fbi.gov/stats-services/publications/2011-national-gang-threat-assessment [hereinafter The Federal Bureau of Investigation 1].

[2] The Federal Bureau of Investigation, Gangs, The FBI (last visited July 26, 2012), http://www.fbi.gov/about-us/investigate/vc_majorthefts/gangs/ [hereinafter The Federal Bureau of Investigation 2].

[3] The Federal Bureau of Investigation 1, supra; The Federal Bureau of Investigation 2, supra.

[4] The Federal Bureau of Investigation 1, supra; The Federal Bureau of Investigation 2, supra.

[5] The Federal Bureau of Investigation 1, supra.

[6] Id.

[7] Arlen Egley, Jr. & James C. Howell, Highlights of the 2010 National Youth Gang Survey, U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention (April 2012), http://www.ojjdp.gov/pubs/237542.pdf; The Federal Bureau of Investigation 1, supra.

communities in an effort to recruit new members and collaborate with other gangs, expand territory for drug distribution, and increase profit and influence.[8]

Often the gangs that are found on Indian Reservations emulate urban gangs that are nationally recognized.[9] The Native American gangs emulate the nationally recognized urban gangs by adopting the identifiers such as names, signs, symbols, and colors.[10] This emulation does not extend to organization, since Native American gangs tend to have a loosely organized or nonexistent leadership structure in place.[11] Some of the gangs, such as the Native Mob and Native Pride, were "formed in the prison system and then expanded to reservations."[12] Even though most of the gangs that operated within Indian Country are not organized and lack the structure and control over territories and populations that other urban gangs do, these gangs are still committing serious crimes and engaging in violent activities. [13] Most gangs in Indian Country have seized on the opportunity to "utilize Indian Reservations to facilitate and expand their drug operations. [14]

II. State Anti-Gang Criminal Ordinances

Even though gang violence and related crime have resulted in the public pressure for tougher legislation, "criminal anti-gang ordinances have met with particular resistance and invalidation by the courts based on constitutional challenges."[15] The constitutional challenges to anti-gang criminal ordinances are based on the doctrine of vagueness and overbreadth.[16]

A. The Doctrine of Vagueness

The due process clauses of the Fifth Amendment and the Fourteenth Amendment provide the basis for the vagueness doctrine.[17] The doctrine of vagueness was designed "to ensure that citizens are given fair warning as to what types of behaviors are proscribed by the statute"[18] and to prevent the arbitrary or discriminatory enforcement of

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[8] The Federal Bureau of Investigation 1, supra.
[9] Id.
[10] Id.
[11] Id.
[12] Id.
[13] Id.
[14] Id.
[15] Silvia Perez, Alternatives in Fighting Street Gangs: Criminal Anti-Gang Ordinances v. Public Nuisance Laws, 13 St. Thomas L. Rev. 619, 619 (2001).
[16] Beth Bjerregaard, The Constitutionality of Anti-Gang Legislation, 21 Campbell L. Rev. 31 (1998); Perez, supra.
[17] Bjerregaard, supra at 33.
[18] Id.

the law.[19] The danger of a vague anti-gang criminal ordinance is that it could "have a 'chilling' effect on . . . freedom of association, as citizens may simply refrain from exercising their rights to free . . . association rather than risk violating a statute that they cannot interpret."[20]

An anti-gang criminal ordinance will be void for vagueness if persons "of common intelligence must necessarily guess at its meaning and differ as to its application"[21] and "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute."[22] Actual notice is not required.[23] The standard for evaluating the vagueness of a statute is that a "'person of ordinary intelligence [is provided] a reasonable opportunity' to know what conduct is prohibited."[24]

An anti-gang criminal ordinance will be void for vagueness if there are not clear standards laid out for law enforcement officers to follow when enforcing the law that would limit discretion and avoid the law being applied in an arbitrary or discriminatory manner.[25] If a piece of legislation did not include guidelines it would open the door for "erratic arrests and standardless intrusions, as police, prosecutors, and juries may reach different conclusions about the purpose of application of a law."[26]

The rational basis standard is employed to examine challenges to anti-gang criminal ordinances regarding substantive due process.[27] To survive this challenge the legislation must "be rationally related to a legitimate government interest.[28] This can result in harmless activities being conducted by innocent people can be prohibited as long as there is a rational basis and a constitutional right is not affected.[29]

There are several ways for states to avoid vagueness challenges to anti-gang legislation. The piece of legislation could include a specific intent requirement, narrow statutory definitions, or active participation coupled with actual knowledge.[30] The specific intent requirement ensures that the criminal conduct is related to the gang.[31] The

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[19] Michael J. Rossi, Striking a Balance: The Efforts of One Massachusetts City to Draft an Effective Anti-Loitering Law Within the Bounds of the Constitution, 39 Suffolk U. L. Rev. 1069, 1075 (2006).
[20] Bjerregaard, supra at 33.
[21] Id. (quoting Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926)).
[22] Perez, supra at 630 (quoting United States v. Harris, 347 U.S. 612, 812 (1954)).
[23] Rossi, supra at 1075.
[24] Perez, supra at 631 (quoting Grayned v. City of Rockford, 408 U.S. 104 (1972)).
[25] Bjerregaard, supra at 33.
[26] Rossi, supra at 1076.
[27] Perez, supra at 628.
[28] Id.
[29] Id. at 628-29.
[30] Bjerregaard, supra at 34-35.
[31] Id. at 34.

narrow statutory definitions will limit the law being applicable to non-gang members.[32] The active participation coupled with actual knowledge "ensures that only members who are aware of the gangs' criminal activities and who actively participate in these enterprises are punished."[33]

B. The Doctrine of Overbreadth

The rights protected under the First Amendment provide the basis for the overbreadth doctrine.[34] The doctrine of overbreadth was designed to ensure that citizens are not deterred from engaging in "constitutionally protected conduct"[35] and to prevent the arbitrary or discriminatory enforcement of the law.[36] The danger of an overly broad anti-gang criminal ordinance is that it could deter the exercise of freedom of association of non-gang members.

The Constitution of the United States does protect freedom of association but gangs are not associations that are worthy of constitutional protection.[37] The Supreme Court has made it very clear that "there is no place for violence in a democratic society dedicated to liberty under law, and that the right of peaceful protest does not mean that everyone with opinions or beliefs to express may do so at any time and at any place."[38]

When there is a constitutional challenge to an anti-gang criminal ordinance, "the court must determine whether the ordinance 'reaches a substantial amount of constitutionally protected conduct.'"[39] An overbreadth challenge to an ordinance that prohibits innocent conduct may survive so long as the "statutory overbreadth '[is] not only . . . real, but substantial as well.'"[40] A statute would not be considered to be overbroad if it only limits undesirable behavior that is not constitutionally protected.[41]

The Supreme Court of the United States "has recognized a right of citizens to enter into and maintain certain intimate relationships free from undue intrusion by the state[,] . . . [but] the right to associate [only] extends to associations which 'pertain to the social, legal, and economic benefit of the members.'"[42] Gangs would most likely not satisfy as an intimate association.[43] The Supreme Court has not "recognize[d] a general right to 'social association[,]' . . . [but] has declared that mere membership in an

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[32] Id. at 34-35.
[33] Id. at 34.
[34] Id. at 35; Rossi, supra at 1076.
[35] Perez, supra at 629.
[36] Bjerregaard, supra at 35-36.
[37] Perez, supra at 627-28 (citing to Dallas v. Stanglin, 409 U.S. 19 (1989)).
[38] Id. at 628 (citing Cox v. Louisiana, 379 U.S. 559, 574 (1965)).
[39] Id. at 630.
[40] Rossi, supra at 1076-77 (citing Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973)).
[41] Bjerregaard, supra at 35.
[42] Id. at 36 (quoting Griswold v. Connecticut, 381 U.S. 479, 483 (1965)).
[43] Id. at 37.

association cannot be criminalized."[44] It is important to remember that the First Amendment right to association is not absolute and the Supreme Court is more likely to view the criminal conduct of a gang as abrogating associational rights.[45]

The strict scrutiny standard is employed to examine challenges to anti-gang criminal ordinances regarding freedom of association.[46] To survive this challenge the legislation "must further a compelling governmental interest and must employ the lease restrictive means of accomplishing that objective."[47]

There are several ways for states to avoid overbreadth challenges to anti-gang legislation. The piece of legislation could include portion on the compelling interest, specifically "exclude constitutionally protected activity from the scope of the statute," or including a specific intent requirement.[48] States such as Arkansas, California, Colorado, and Florida have included why "the states have a compelling interest in preventing criminal street gang activity" within anti-gang criminal ordinances.[49] States such as Arkansas, California, Florida, Georgia, Illinois, and Louisiana have included clauses that explains that the law is not intended "to interfere with the constitutional exercise of the protected rights and freedoms of . . . association."[50] Including a specific intent requirement in the anti-gang criminal ordinance "narrows the potential reach of the statute."[51]

III. Tribal Anti-Gang Criminal Ordinances

Indian tribes are sovereigns and therefore able to enact and enforce laws as long as the Indian Civil rights Act[52] is not violated and the Indian tribes have jurisdiction.[53] Historically, the federal courts did not apply the rights guaranteed by the United States Constitution to individual Indians and Indian tribes.[54] The Indian Civil Rights Act changed that and it prohibits tribal governments from restricting or infringing upon the rights specified in the legislation.[55] It imposes restrictions on tribal governments to

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[44] Id.
[45] Id.
[46] Id.
[47] Id.
[48] Id. at 36-39.
[49] Id. at 38.
[50] Id. at 38-39.
[51] Id. at 39.
[52] 25 U.S.C. §§ 1301-03 (2010).
[53] The Tribal Law and Policy Institute, General Guide to Criminal Jurisdiction in Indian Country, Tribal Court Clearinghouse (last visited July 26, 2012), http://www.tribal-institute.org/lists/jurisdiciton.htm [hereinafter The Tribal Law and Policy Institute 1].
[54] Settler v. Lameer, 507 F.2d 231 (9th Cir. 1974).
[55] 25 U.S.C. § 1302 (2010).

ensure that the rights of individuals are protected.[56] The Indian Civil Rights Act also includes definitions of "Indian tribe," "powers of self-government," "Indian court," and "Indian"[57] as well as the right of habeas corpus.[58] Even though the Indian Civil Rights Act uses some of the same language as the Bill of Rights; that "same language does not necessarily have to be interpreted in the same way."[59]

Tribal criminal jurisdiction is limited due to the Major Crimes Act[60] and the General Crimes Act,[61] which grant criminal jurisdiction to the federal government depending on the political status of the perpetrator, as well as the victim, and the crime committed.[62] Generally, Tribal criminal jurisdiction is limited to crimes where the perpetrator is an Indian, the victim may be an Indian or a non-Indian, and the crime does not fall under the Major Crimes Act or the General Crimes Act.[63] The Major Crimes Act grants the federal government criminal jurisdiction over sixteen offenses including murder, manslaughter, kidnapping, maiming, . . . incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, . . . an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and" felonies specified under other pieces of legislation when committed in Indian Country.[64] The General Crimes Act grants the federal government criminal jurisdiction over offenses "except as otherwise expressly provided by law."[65] Neither, the Major Crimes Act or the General Crimes Act cover anti-gang ordinances.

Tribal criminal jurisdiction is also limited by Public Law 280,[66] abrogates tribal criminal jurisdiction in certain states.[67] Public Law 280 applies in Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin which exceptions for the Annette Islands

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[56] Wounded Head v. Tribal Council of Oglala Sioux Tribe of Pine Ridge Reservation, 507 F.2d 1079 (8th Cir. 1975).
[57] 25 U.S.C. § 1301 (2010).
[58] Id. § 1303 (2010).
[59] The Tribal Law and Policy Institute, Indian Civil Rights Act, Tribal Court Clearinghouse (last visited July 26, 2012), http://www.tribal-institute.org/lists/icra.htm [hereinafter The Tribal Law and Policy Institute 3] (citing Santa Clara Pueblo v. Martinez, 439 U.S. 49 (1978)).
[60] 18 U.S.C. § 1153 (2006).
[61] Id. § 1152 (1948).
[62] The Tribal Law and Policy Institute 1, supra.
[63] Id.
[64] 18 U.S.C. § 1153 (2006).
[65] Id. § 1152 (1948).
[66] Id. § 1162 (2010).
[67] The Tribal Law and Policy Institute, Public Law 83-280, Tribal Court Clearinghouse (last visited July 26, 2012), http://www.tribal-institute.org/lists/pl_280.htm [hereinafter The Tribal Law and Policy Institute 2].

in Alaska, the Red Lake Reservation in Minnesota, and the Warm Springs Reservation in Oregon.[68]

There are tribal governments that are enacting and enforcing anti-gang criminal ordinances. There have not been any cases in federal court regarding their constitutionality. Since the Indian Civil Rights Act will not be interpreted to mean the same thing that the similarly worded Bill of Rights, it is unclear how constitutional challenges will be decided. The boundaries of due process under the Indian Civil Rights Act are not distinct or defined, but the Supreme Court has demonstrated a willingness to interpret the due process portion of the Indian Civil Rights Act based on individual Indian Tribes.[69] With this uncertainty, the best strategy would be for tribal governments to enact anti-gang criminal ordinances that are similar to those enacted by states that have survived constitutional challenges. If anti-gang criminal ordinances enacted by tribal governments "are tailored narrowly enough to encompass only clearly criminal conduct, freedom-of-association rights will not be implicated or chilled" and will most likely survive constitutional challenges in federal courts.[70]

The Eighth Circuit Court of Appeals used the doctrine of vagueness and overbreadth to determine that the Crow Creek tribal ordinances defining the crime of disorderly conduct may violate the Indian Civil Rights Act and remanded the case for further review.[71] This is evidence that federal courts are willing to use the doctrine of vagueness and overbreadth to find tribal ordinances unconstitutional under the Indian Civil Rights Act. The same types of legal analysis may be used to find an anti-gang criminal ordinance unconstitutional.

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[68] Id.

[69] Eric Wolpin, Answering Lara's Call: May Congress Place Nonmember Indians Within Tribal Jurisdiction Without Punning Afoul of Equal Protection or Due Process Requirements?, 8 U. Pa. J. Const. L. 1071, 1089 (2006).

[70] David R. Truman, Note: The Jets and Sharks are Dead: State Statutory Responses to Criminal Street Gangs, 73 Wash. U. L. Q. 683, 716-17 (1995).

[71] Big Eagle v. Andera, 508 F.2d 1293 (8th Cir. 1975).