

ACLU-WA Response: Fact-Checking the Fact-Checker on the Gang Bill

The ACLU of Washington stands by its negative assessment of Attorney General Rob McKenna’s “anti-gang” bill, [HB 1126](#).ⁱ Gang violence is a scourge in our communities, but the AG’s bill would not help reduce it. The 51-page measure is a compendium of tactics that evidence shows have failed to stem the tide of gang involvement or violent crime.ⁱⁱ

Other experts warn strongly against “blindly following in Los Angeles’ troubled footsteps.”ⁱⁱⁱ And California’s own Attorney General stated [at her inauguration](#) that “[f]or many offenders, we know prison amounts to attending ‘Crime College.’ It’s a vicious cycle, where new inmates face extraordinary pressure to affiliate with gangs on the inside, which boils over into our communities on the outside. Perpetuating a system that recycles a majority of parolees isn’t tough on crime. It’s tough on the taxpayers.”^{iv}

It’s time to follow the best practices recommended by experts, including the federal government—provide appropriate prevention and intervention services for vulnerable youth instead of putting them in prison to be initiated into gangs, as the AG’s bill would have us do.

ATTORNEY GENERAL CLAIM

The bill focuses squarely on members of criminal street gangs. The bill’s civil protection orders, which provide a zone of safety in neighborhoods hardest-hit by criminal street-gang activity, are only allowed to be used on those found by “clear and convincing evidence” by a court to be active members of a criminal street-gang involved in a pattern of criminal activities.

FACT

All that needs to be proven for an injunction to issue is that a gang exists, is active in the area, and that the subject is a “member or associate” of that criminal street gang.^{vi} In fact, *no requirement is included in the bill that the subject have committed any crime at all.* And as was evident from the testimony presented in the [House hearing](#)^{vii} on Wednesday, similar gang injunctions in California have indeed resulted in the profiling of innocent community members not affiliated with gangs.^{viii}

ATTORNEY GENERAL CLAIM

Contrary to the ACLU claim that these kinds of laws “make the problem worse,” in Los Angeles County, crime levels dropped by up to 10 percent in neighborhoods benefitting from a similar law. A survey of San Bernardino, Calif., residents showed “positive evidence of short-term effects, including less gang presence, fewer reports of gang intimidation, and less fear of confrontation with gang members.” And in San Antonio, Texas, gang members subjected to the law “were charged with almost 50 percent fewer crimes in the 20 months after the injunction issued.” In other words, the law provided an incentive for gang members to cease some of their criminal activities.

FACT

The weight of the evidence suggests that gang injunctions are ineffective at best, and at worst, actively harmful. The very experts whose study the AG’s office cites in their press release state that stories of reductions in crime through use of injunctions “are often compelling, but are never buttressed with supporting evidence that meets minimal scientific standards of evaluation.”^{ix} They also find “little support for a positive effect” when they examine crime patterns before and after the injunction, and find that “negative effects were observed in the secondary, less disordered injunction area.”^x

Another recent study warns that “even if interpreted as constitutional, gang injunctions have been proven ineffective in preventing and deterring gang members from engaging in violent gang activity.”^{xi} Even worse, an ACLU-funded study in the San Fernando Valley found a disturbing *increase* in violent crime due to an injunction.^{xii} Our conversations with community members from California found that faced with an injunction, gang members simply pick up and move to new territory, resulting in the spread, rather than the curtailment, of gang blight.

ATTORNEY GENERAL CLAIM

The bill allows civil protection orders modeled after domestic violence protection orders and anti-harassment orders. The standard for showing the court that a person is a criminal street gang member is high. Law enforcement must provide a written document to the court, made under oath, that a person is an active member of a criminal street gang and intentionally promotes, furthers, or assists in criminal acts by that gang, and that the subject of a protection order has shown a pattern of criminal street gang activity. That pattern includes dealing drugs, breaking firearms laws, or going to a school and harassing or intimidating kids into joining a gang. Simply being friends with gang members is not enough — a judge must be convinced that a person is an active participant in criminal gang activity. And unless a prosecutor petitions the court, the protection order automatically expires after a year.

FACT

Again, a fundamental flaw in the legislation is that *nowhere does it require that an individual have actually committed a crime in order to be subjected to an injunction.* If the AG’s office is truly interested in pursuing hardcore gang-bangers, the bill should require proof that the respondent actually committed a “criminal street gang-related offense”—a term for which a [statutory definition](#) exists.^{xiii}

The bill relies on a tangle of loose definitions and confusing terms. The very definition of a “criminal street gang” is circular—it is defined, in part, as having “members or associates individually or collectively engage in or have engaged in a pattern of criminal street gang activity.” The latter term is not defined at all. Nor is there a definition for “intentional promotion” as used in the bill—there is no elaboration of what kinds of activities short of crimes might constitute the “clear and convincing evidence” needed. In fact, the bill expressly states that the court may consider “all relevant evidence.” So how youth dress and who they hang out with can in fact be used to prove that they are a “member or associate of a gang.”

Since each of the activities the AG's office cites as a basis for a gang injunction is already a crime in itself, why would the police not arrest and charge individuals for those crimes, rather than waste time and precious public safety resources on an injunction?

ATTORNEY GENERAL CLAIM

As the ACLU knows, appointment of counsel at a protection order hearing is not constitutionally required because the protection order hearing is a civil hearing. This is how anti-domestic violence and anti-harassment protection orders work. This protection order statute is identical to all other protection order statutes in Washington in that none of them require court-appointed counsel at the protection order hearing.

FACT

Whether or not it is constitutionally required, the ACLU has always supported the statutory right to appointment of counsel in cases where the government is seeking to deprive an individual of a significant civil liberty. And the state of Washington has a long, proud history of statutorily requiring the appointment of counsel even when that right is not constitutionally required if the individual faces the loss of liberty.

If the AG's office were serious about protecting the civil liberties of the people who will be subject to these injunctions, their bill would include the provision of appointed counsel to individuals in their injunction hearings. Having counsel is especially important in this situation because the youth facing these injunctions are likely to be low-income and unable to afford an attorney. Without counsel, youth subject to an injunction are unlikely to be able to effectively challenge it even if they are not gang members.^{xiv}

The proof required to obtain an injunction falls far short of the "beyond a reasonable doubt" standard required to convict someone of a crime. And the bill's notification requirements are also fatally flawed—simply publishing a notice that a prosecutor is seeking an injunction against an individual is allowed under the bill, leading to the disturbing possibility that an individual may become subject to an injunction *without ever knowing the proceeding is taking place.*

Though proponents assert the measure will only bar criminal or harmful activity by youth, in fact, the bill empowers judges to grant "all relief necessary and proper," and also to bar youth from visiting designated locations, wearing particular clothes, or "directly or indirectly" contacting certain individuals. This means that the young person could face criminal charges for doing things that the rest of us can legally do—in other words, simply for living his life. Even the exceptions written into the bill for family members or legitimate purposes are problematic—how would an officer know that an individual is in the injunction zone to visit family members?

ATTORNEY GENERAL CLAIM

If the ACLU does not oppose domestic violence protection orders, in which an individual under serious threat of injury petitions the court for protection, it is inconsistent for the organization to

oppose protection orders against known criminal street gang members, who intimidate and harm entire neighborhoods.

FACT

Gang injunctions and domestic violence protection orders are completely different animals and trying to compare the two is illogical. A domestic violence protection order is an order obtained by an individual against another individual based on proof that the respondent poses an imminent threat of harm to the petitioner. These orders are based on specific incidents that have reasonably led the petitioner to fear for his or her safety.

By contrast, gang injunctions are court orders obtained by the government against an individual falling into a vaguely defined group, and who may not pose an imminent threat of harm to anyone. The government is not required to prove that the alleged gang member has or is threatening to cause any specific harm to any specific people. This is much broader dragnet that demands greater protections, including the right to counsel in order to prove that an individual should not be subject to an injunction.

ATTORNEY GENERAL CLAIM

Attorney General McKenna has long promoted intervention and prevention programs to help young people stay out of or abandon gangs. Through Consumer Protection settlements, AG McKenna has directed more than \$600,000 to sponsor conferences featuring drug, alcohol and violence prevention programs for youth. This year, the AG's anti-gang bill originally called for \$10 million in gang prevention and intervention programs – the same amount called for by the Legislative Gang Workgroup in 2008. As in 2008, due to budget concerns, it was removed at the request of legislators, and replaced with language calling for the state to approach the federal government for funds.

It's unclear whether or not the ACLU of Washington State has ever raised funds for anti-gang intervention or prevention programs. Last year, the ACLU also declined the Attorney General's Office's offer to participate in the crafting of the anti-gang bill.

FACT

The ACLU of Washington participated in the 2008 Legislative Gang Workgroup and advocated strongly for prevention and intervention funds rather than failed suppression tactics. We agree entirely with the AG that suppression tactics without prevention and intervention programs are doomed to failure. But the version of the bill introduced into the legislature at the AG's request fails to include any funding at all for prevention and intervention.

The ACLU of Washington in fact met with the AG's office immediately after becoming aware of their gang bill, and well before the legislative session. We clearly expressed our concerns about this legislation then. It is unfortunate both that we were not invited into the process earlier, and that none of our suggestions were incorporated into the actual bill.

ATTORNEY GENERAL CLAIM

Lawmakers are being blanketed with computer-generated e-mails that spread inaccuracies and misleading accusations about the Attorney General's anti-gang bill, HB 1126.

FACT

Those “computer-generated emails” came from real people—concerned community members, some of whom testified at this week’s hearing on the AG’s bill, a clear majority of them in opposition. And if further proof is needed that communities are concerned about the bill’s consequences, the following respected community-based organizations all opposed the bill as of January 21, 2011:

ACLU of Washington
Aliansa Student Coalition
A. Philip Randolph Institute
Asian Counseling & Referral Service
Asia Pacific Cultural Center
Asian Pacific Islander Coalition of King County
Asian Pacific Islander Coalition of Peirce County
Building the Bridges
Center for Justice (Spokane)
Central Washington Progress
Children's Alliance
Community to Community
Council on American-Islamic Relations – Washington Chapter
El Centro de la Raza
El Comite
Filipino Community of Seattle
First Place School
FUSE Washington
Japanese American Citizens League - Seattle Chapter
Latino Civic Alliance
Latino Community Fund
Lutheran Public Policy Office of Washington
Merci Foundation
Minority Executive Directors Coalition
Mothers for Police Accountability
Mujeres Fuertes
Mujeres of the Northwest
NAACP-Seattle/King County
Nonprofit Assistance Center
Northwest Immigrant Rights Project
Northwest Leadership Foundation
OneAmerica
People Advocating Involvement in Democracy

Powerful Voices
The Conversation
Tierra Nueva
SafeFutures Youth Center
SEIU Healthcare 775NW
SEIU Local 925
Social Work Immigration Alliance
Southwest Youth and Family Services
Statewide Poverty Action Network
Washington Association of Churches

ⁱ *House Bill 1126*. Available at: <http://apps.leg.wa.gov/documents/billdocs/2011-12/Pdf/Bills/House%20Bills/1126.pdf>

ⁱⁱ See: Greene, J & Pranis K. 2007. *Gang Wars: The Failure of Enforcement Tactics and the Need for Effective Public Safety Strategies*. Washington, DC: Justice Policy Institute. (Reporting that despite widespread use of gang injunctions, Los Angeles remains the gang capital of the world).

ⁱⁱⁱ *Gang Wars* at 3.

^{iv} *Attorney General Kamala D. Harris Inaugural Remarks*. Available at: http://ag.ca.gov/cms_attachments/press/pdfs/n2021_final_speech.pdf

^v See: Cahill, M & Hayeslip D. 2010. *Findings from the Evaluation of OJJDP's Gang Reduction Program*. Bulletin. Washington, DC: U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention.

^{vi} See *House Bill 1126*, *supra* note i.

^{vii} *House Hearing on Bill 1126*. Available at:

<http://www.tvw.org/media/mediaplayer.cfm?evid=2011010147&TYPE=V&CFID=2258052&CFTOKEN=57754613&bhcp=1>

^{viii} See: Jones A. 2008-2009. "Family Ties or Criminal Contacts: A Case for the Appointment of Counsel in Civil Gang Injunction Proceedings That Affect Family Relationships", *Golden Gate University Law Review*, vol. 39, pp. 41; Tapia, M. 2010. "US Juvenile Arrests: Gang Membership, Social Class, and Labeling Effects." *Youth Society*. Available at: <http://yas.sagepub.com/content/early/2010/10/22/0044118X10386083>; and Cannata, M. 2009. "Achieving Peace in the Streets: How Legislative Efforts Fail in Combating Gang Violence in Comparison to Successful Local Community-Based Initiatives", *New England Journal on Criminal & Civil Confinement*, vol. 35, pp. 243- 276.

^{ix} Maxson C, Hennigan K, & Sloane D. 2003. "For the Sake of the Neighborhood?: Civil Gang Injunctions as a Gang Intervention Tool in Southern California", in S Decker (ed.), *Policing Gangs and Youth Violence*, Belmont, CA: Wadsworth.

^x Maxson C, Hennigan K, Sloane D, & Kolnick K. 2005. *Can Civil Gang Injunctions Change Communities? A Community Assessment of the Impact of Civil Gang Injunctions*. Report submitted to the National Institute of Justice, US Department of Justice.

^{xi} Myers T. 2008-2009. "The Unconstitutionality, Ineffectiveness, and Alternatives of Gang Injunctions." *Michigan Journal of Race and Law*, vol. 14, at 285.

^{xii} American Civil Liberties Union (ACLU) of Southern California. 1997. *False Premises, False Promises: The Blythe Street Gang Injunction and Its Aftermath*. Los Angeles: ACLU Foundation of Southern California.

^{xiii} *RCW 9.94A.030 (12-14)*. Available at: <http://apps.leg.wa.gov/RCW/default.aspx?cite=9.94A.030>

^{xiv} Jones, "Family Ties," at 41.