

SOCIOLOGICAL PRACTICE: AS AN EXPERT-WITNESS IN THE CRIMINAL JUSTICE SYSTEM

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In general, in my "sociological practice" over the years, I have researched and worked directly with offenders, utilizing group psychotherapy, with gangs, criminals and delinquents in a variety of settings including the community, prisons, therapeutic-communities, and psychiatric hospitals. All of this past work has contributed enormously to my primary current sociological practice as a "legal-consultant" and "expert-witness" in the criminal justice system. The foundation for my work as an expert-witness in gang and violence cases is based on my professional experience and research as delineated in several of my books. [THE VIOLENT GANG (Macmillan, 1962); CRIMINOLOGY (HarperCollins, 1990); THE THERAPEUTIC COMMUNITY: A SUCCESSFUL METHOD FOR TREATING SUBSTANCE ABUSE, (GARDNER PRESS, 1991); GANGSTERS: 50 YEARS OF MADNESS, DRUGS, AND DEATH ON THE STREETS OF AMERICA (NEW YORK UNIVERSITY PRESS, 1998); and JUVENILE DELINQUENCY: INTO THE 21ST CENTURY (Wadsworth, 2000).]

My preparation for and testimony in the courtroom involves the presentation of various sociological theories, and opinions derived from my research, that aids the judicial process. In this regard I have determined that many criminological theories are irrelevant when I have attempted to relate them to my "expert opinions" in the real world of court cases. In the courtroom situation ivory tower conjectures often prove to be irrelevant. And care has to be exercised in responsible testimony because a person's life (in prison) or death (by lethal injection) often hangs in the balance. Some criminological theories prove to be most relevant and aid me in presenting opinions in court that foster the dispensation of appropriate justice. I take my role in the system very seriously since, in addition to the defendant's life, the outcome of a criminal trial affects many parties affected by the criminal act including the victim and his/her family who are entitled to a fair and just verdict.

RELEVANT SOCIOLOGICAL AND CRIMINOLOGICAL CONCEPTS THAT ARE USEFUL IN THE CRIMINAL JUSTICE PROCESS.

Following is a brief analysis of some criminological concepts that hold up in court and facilitate this form of "sociological practice." Although, I have participated in various cases my focus will be on social psychological and sociological concepts useful in violent gang and murder cases. In the process of preparing for testimony and testifying several social psychological and criminological issues have emerged that I have found to be relevant in my practice include: (1) The structure of gangs and the roles of youths in violent gangs; (2) The cultural rules and regulations required for participating in a gang;

(3) The utilization of the legal concept of "imperfect self-defense"; and (4) Marvin Wolfgang's socio-criminological concept "victim-precipitated violence."

Gang Structure. Based on my extensive research of gangs since 1950 for my books THE VIOLENT GANG (1962) and GANGSTERS (1997), I have developed my theory of the violent gang as a "near-group." The theory, simply stated, posits that gangs, unlike the popular viewpoint and the police perspective, vary with regard to their degree of organization. Some gangs are very cohesive, closely-knit and well organized. In contrast, gangs that fit the model of a "near-group" are very loosely structured, and the concept of "membership" as is found in most coherent groups is unclear. This factor, of gang organization, is significant in a criminal trial, since a defendant may be a core participant in a gang or on the periphery depending on the degree of cohesiveness of the relevant gang and his role in the gang.

Gang Roles. The police, the courts, legislation and the mass media always use the term- "gang member." I find that clear membership in a "near-group", like a violent gang, is debatable. Consequently, I prefer to refer to an individual's "level of participation" in a gang in my testimony. In my opinion, it more clearly reveals the role and degree of criminal involvement of a youth in any given gang structure. His level of participation can be a significant determinant of his legal culpability.

In this regard, based on my research and a review of the literature on gangs, I have delineated 6 basic types of gang roles and non-roles that are pertinent in identifying the legal responsibility of a gang defendant:

(1) "OG's" or "Veteranos" are longtime core gangsters dedicated to their gang. They are individuals who have "put in work" and earned their status in the illegal behavior of the gang;

(2) "Gs" are gangsters who comprise the general troops of the gang;

(3) "Wannabees" are young interns aspiring to become gangsters, and they often commit illegal acts known as "putting in work" to gain a higher status in the gang;

(4) "Gangster-groupies" comprise a relatively new category of youths who do not ordinarily participate in criminal gang activity but gravitate to and apparently enjoy hanging-out with gangsters out of their own ego needs, and intrigue with the gangster life-style. They tend to dress and talk like Gs, and are enamored with "Gangsta-Rap" music. They are often caught up in the net of police arrest when a gang crime has been committed;

(5) "Residents in a G neighborhood" are young men who have grown up and live in a gang neighborhood. Literally, some of their best friends or relatives are Gs. They often hang-out, dress in G clothes-styles, go to school, and party with Gs from their neighborhood. Although they basically lead a legal and constructive life in work and school, they are often identified by the police as gang "associates" when they are stopped by the police in the company of Gs. They are often falsely labelled as Gs by police identification as "associates", even though their self-concept and their behavior indicates that they do not belong to a gang or participate in the illegal acts of a gang. **THESE YOUTHS ARE PRONE TO "BE IN THE WRONG PLACE, AT THE WRONG TIME" AND ARE TOO OFTEN UNJUSTLY ARRESTED AND CONVICTED AS FELONS IN A GANG ACTIVITY. THIS ISSUE HARKS BACK TO THE OLD LEGAL**

DICTION OF "GUILT BY ASSOCIATION. " BEING IN THE PRESENCE OF FRIENDS OR RELATIVES WHO ARE IN A GANG DOES NOT NECESSARILY MAKE A YOUTH A CO-CONSPIRATOR IN AN ILLEGAL GANG ACTIVITY. (See the United States Supreme Court's 1999 decision in overturning a Chicago "anti-loitering" law; and Lewis Yablonsky's article "The Affirmation of 'Hanging Out' The U.S. Supreme Court Ruling on Gang Busting Laws" in THE JOURNAL OF GANG RESEARCH Summer, 1999.)

(6.) "Former Gangsters" are individuals who at one time in their earlier years were participants in a gang. Contrary to popular belief, because of the "near-group" usually disorganized nature of gang structure--many youths leave the gang and become law-abiding citizens. This pattern is more prevalent than the "police perspective" on "membership" would believe. Many youths, who were formerly in gangs, achieve regular employment, get married, become involved with their family, and seek to continue their education. The street gang theory of "blood-in, blood-out" referring to lifelong "gang membership" is a myth. Regrettably, after leaving the gang, youths often maintain a relationship with former homies--and sometimes find themselves in "the wrong place at the wrong time" when a crime has been committed.

I have found these 6 designations of gang roles of significance in my testimony as an expert-witness since "membership" is not uniform; and the defendants culpability for a gang crime is important in determining guilt or innocence in court. More specifically, these two latter categories of less culpable youths, G-groupies and "Resident Gs" are too often caught in the net of a violent gang incident, identified as co-conspirators, and become subject to the overkill punishment of (25 years to life) imprisonment that is meted out to the more involved gangsters under "Gang-Enhancement" laws. As an expert-witness, after careful analysis and interrogation of a defendant, I can make these distinctions in my reports and testimony--and this information is of aid to the judicial process in rendering a just decision on a defendant's guilt or innocence in a gang crime.

A significant factor in the complex of gang activity and behavior is the California Gang-Enhancement Law. In the context of this law, police and prosecutors too often squeeze deviant behavior into gang behavior, and erroneously prosecute a youth for gang behavior, when they are innocent of this offense. For analysis purposes, following are the main elements of Penal Code 186.22, often referred to as the "gang-enhancement law:"

The law states in part that: "Every person who actively participates In any criminal street gang with knowledge that the members are engaging in or have engaged In a pattern of criminal gang activity, and who willfully promotes, furthers, or assists In any felonious criminal conduct by members of that gang, Is guilty of a violation of Penal Code section 186.22, subdivision , a crime... "Criminal street gang means any ongoing organization, association or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of [crime list.] Active participation means that the person(1) must have a current relationship with the criminal street gang that is more than in name only, passive, inactive or purely technical, and (2) must devote all, or a substantial part a [his] [her] time or efforts to the criminal street gang."

"In order to prove this crime [a gang crime], each of the following elements must be proved: 1.A person actively and currently participated In a criminal street gang; 2.The

members of that gang engaged in or have engaged in a pattern of criminal gang activity; 3. That person knew that the gang members engaged in or have engaged in a pattern of criminal gang activity, and 4. That the person aided and abetted member[s] of that gang in committing the crime(s)."

A factor that needs to be added into the analysis of the gang law is that simple membership in a gang does not prove the intent to commit a crime. For example in an opinion rendered in an appeal case (Superior Courts 95CF2769 and J-161645) one Appeal's Court Judge stated: "...mere presence at the scene of the crime which does not itself assist the commission of the crime does not amount to aiding and abetting."

Another significant statement in the Appeal Courts decision stated "evidence that a person was in the company of or associated with one or more persons alleged or proved to have been members of a conspiracy, is not, in itself, sufficient to prove that such a person was a member of the alleged conspiracy."

In brief, association with other gang members "without more" ["more" in the words of an appellate judge means more evidence], does not make an individual gang member guilty of the crimes of others, "unless there is an act of backup". In other words, you can't convict someone as having committed a crime through the disproved time-worn concept of "guilt by association." Despite this definition, many youths are convicted who do not fit these criteria.

Another aspect of this analysis of gang culpability, is that a gang member may commit a crime that has nothing to do with his participation in his gang. A few examples make this point. A gang member may be carrying a weapon for self-protection, and his being armed has nothing to do with his gang affiliation. A "made" member of the mafia may kill a man who he finds in bed with his wife--and the murder has nothing to do with a mafia crime in the context of RICO (Racketeer-Influenced-Corruption-Organization) gang laws. In brief, a violent act committed by a youth unrelated to his gang affiliation, does not warrant the activation of the gang-enhancement law at his trial--although many youths are convicted on the premise of the law. (Recently RICO has been used by the Federal Government in the case of the so-called Mexican Mafia. I am currently working on a case in the defense of an alleged Eme member.)

The foregoing categorizations of gang structure and gang roles are significant in a trial in determining the level of culpability of a youth in a criminal gang incident. It is apparent that OGs are likely to be leaders more involved in a violent criminal incident than peripheral Wannabees, groupies, or residents in a gang neighborhood who in many cases have limited or no criminal responsibility.

A CASE-IN-POINT: GERARDO In 2000 I testified in several gang homicide cases regarding the participation of several defendants in violent gang behavior. Notable among these cases [5/10/00] was a youth charged with First-Degree Murder who, in my opinion, had no gang involvement, "was in the wrong place at the wrong time," and after a thorough investigation of his background I identified as fitting into categories 5 .

He had attended a wedding and was given a ride home by two youths who were previously unknown to him. They were violent gangsters (OGs) who during the ride, spontaneously opened fire on a youth group, shot and killed one person, and wounded 3

others. In my opinion, the defendant I testified about, a youth charged with a 187 1st Degree Murder offense was more of a witness than a perpetrator. Based, in part, on my testimony he was acquitted on the 16 charges brought against him. After the trial, the attorney in the case wrote me as follows:

"I am extremely pleased to report that Gerardo, his mother, his aunt, and I (as well as a packed courtroom) listened to the clerk read 16 verdicts of "not guilty." What a relief! The defendant needed Kleenex as he had tears running down his face. He periodically looked at the jury and mouthed, "thank you." Mrs. A and her sister were also in tears in the audience. The two shooters were convicted of the most serious crimes across the board [and were later given life sentences]. Your name did come up in my short discussions with some of the jurors in the hallway. There were two jurors - one-lady in the back row and one man in the front row --who particularly liked you. They both said they were going to go out and buy your "Gangster" book. They agreed with my closing argument that the primary message that you brought to this trial was that one had to look at the overall picture, not just the negative factors, in deciding whether a person was a gangster. They felt that Detective A [the prosecutor's expert-witness] had overreached in labeling Gerardo a gang member and your analysis was more thoughtful. The front row juror-encouraged me to seek the removal of Gerardo's name from [the California] law enforcement's gang-database. I told him I would indeed seek that relief... I want to thank you for your hard work and intelligent courtroom presentation. Your counsel was something I valued and you certainly assisted me in better representing an innocent young man."

GANG ACTIVITIES. In my experiences in court I have found that judges and juries tend to share the "police perspective" that all gangs are violent and criminal. This perspective clearly affects their judicial decisions. Consequently, I have found it useful to point out that gang behavior is not all criminal. Basically, my research reveals three types of gang activities: (1) Social Activities; (2) Criminal and Delinquent Activities; and (3) Violent Behavior.

(1) Social activities include partying, party crews, some drug and alcohol use, and "hanging-out." The latter activity dovetails with a prototypical American behavioral pattern of youths standing around participating in conversations that can involve movies, dating, sports, and problems. Too often, especially in minority areas, given the "police perspective" on gangs, the benign activity of hanging-out is perceived as illegal--and innocent youths are "profiled" and IDd as gang members in what is known as an F.I. (Field Investigation Report.) This ID, utilized by many police departments, mainly against minority youths, can appear as a negative mark--if the youth is later arrested in a gang incident.

(2) Criminal and Delinquent Activities are often part of a gang's behavior. For example, the notorious Mexican-Mafia or Eme has been characterized as a drug-dealing empire, and this, in part, has validity. Some gangs have so-called "crews" that participate in thefts and robberies.

(3) Gangs do participate in violent activities as individuals and as a group. Based on pseudo territorial disputes--"gang-banging" is a typical pattern. In some cases, an individual emotionally predisposed to violence will utilize the gang as a rational (or a cloak of immunity) for his individualistic sociopathic violent tendencies. His

individualistic behavior, sometimes with a few homie friends, is construed as a major gang act--when in fact it is the violent expression of a few emotionally disturbed individuals who happen to participate in a recognized gang.

Most gangs are primarily involved in one or more of these activities. For example: some gangs are primarily engaged in social activities--including party crews; some are basically involved in criminal and delinquent behavior; and other gangs are essentially gang-bangers who participate in violent behavior. Some gangs include all of these activities. Often a gang's primary activity changes over time. In this context, a youth may participate in a gang's social activities without acting-out in the other activities. Also, often a youth may leave the gang, yet continue to participate in the gang's social activities.

GANG CULTURE. It is useful for all of the participants in a criminal trial related to gang behavior to know and understand various aspects of the gang culture. A knowledgeable gang expert-witness can bring into play in the criminal justice system information that can aid in reaching judicious decisions. Following are a few examples of the gang's culture that are relevant in understanding a gangster's motives and behavior.

The Macho-Syndrome. All gangsters are motivated to present themselves as tough, super-macho Individuals. In my book **GANGSTERS**, I refer to this as "the macho-syndrome" or in some cases "macho-madness." In this context, being "dissed" or disrespected as a man is often the precipitator of gang violence. Being "dissed", usually occurs with some attack on the gangster's masculinity by calling him a "pussy" or a "faggot." Implying that a gangster has feminine characteristics is sufficient grounds in the gang culture for a violent--even homicidal retaliation. The disrespectful epithets used in a violent gang incident are often significant factors in determining motives in a criminal case.

Suicidal Tendencies. It is my viewpoint, based on my research of gangsters in and out of therapy groups, that many gangsters, especially those who continuously participate in gangbanging are suicidal. This emanates from their underlying low self-esteem. Given this lack of concern for themselves, unlike the general population that recoils from violent situations, gangsters tend to jump into violent situations, with little regard for others or themselves. Participation in violent gang activities tends to insure the widely stated platitude among gangsters that "I won't live past 30." Tattoos like, "born to lose", also reinforce their "do or die" attitudes. The macho-syndrome of arrogance and being violent-readily dovetails with their suicidal tendencies.

The Spontaneous Nature of Gang Violence. A major factor of gang culture that is significant in the judicial process is an awareness that gang violence, including drive-by shootings, are not necessarily premeditated acts. They are, often, in the context of "near-group" theory, spontaneous, in the moment acts, that do not constitute premeditated violence. Sometimes an aspiring gangster will commit a bizarre spontaneous violent act for the purpose of what I have referred to as "putting in work" -- in order to acquire his credentials or status in the gang. This behavior is not a premeditated or rational act of violence, and to some extent mitigates the culpability of an offender. In cases involving a gang homicide, they are more likely to call for a charge of 2nd degree murder rather than 1st degree murder.

Other Gang Myths. Myths about gang culture include the assumptions that "homies are

down for each other", "never snitch on a homie," and are committed to "watching each others back." Experienced police officers know that gangsters are not "family" and will inform or "give-up a homie" when it serves their self interest. Gangsters are often very willing to "snitch" on their "bro" in self-defense. This issue can be a significant factor in acquiring information that can aid the judicial process. It is my experience, that most gangsters, when interviewed one-on-one will inform and reveal information vital to the resolution of a criminal case. Also, Gs will put the blame on a non-gangster who may be in the proverbial "wrong place at the wrong time" and this can take the heat off them and get a relatively innocent youth convicted. These are only a few of the myths and realities of gang culture that can be helpful to all of the participants in the criminal justice system. A realistic knowledge of gang organization and culture is invaluable in the true service of justice in a criminal gang case.

THE CONCEPTS OF "IMPERFECT SELF-DEFENSE" AND "VICTIM-PRECIPIATED HOMICIDE."

These are two other basic legal and sociological concepts that I have found most valuable in my testimony in gang and violence cases. They are concepts that relate to the generally inchoate nature of violence; and how in a violent situation in retrospective analysis it is difficult to determine who is the victim and who is the perpetrator. This problem often appears in a defense that involves what is popularly know as "self-defense." There are several laws that illuminate this issue. One such California law is known as "imperfect Self-Defense."

"Imperfect Self-Defense." "Imperfect Self-Defense", as defined by California Law (CALJIC 5.17) is a relevant law that can be utilized in gang homicide and other violent cases. With regard to gang violence the law implies that a violent offense committed by a gangster who believes he is in imminent danger in a gang situation is less culpable for his behavior. The law, under the heading "HONEST BUT UNREASONABLE BELIEF IN NECESSITY TO DEFEND--MANSLAUGHTER" states, in part: "A person who kills another person in the honest but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury, kills unlawfully, but does not harbor malice aforethought and is not guilty of [first degree] murder." In brief, in some violent or homicidal cases this law can be utilized not to exonerate a defendant--but to plead a case down to a lower level of responsibility and punishment. In one case I worked on as an expert-witness a gangster killed another gangster who had invaded his "territory" by stabbing him to death. The perpetrator claimed it was a case of "kill-or-be-killed." The first degree murder charge was reduced to 2nd degree murder.

"Victim-Precipitated-Violence." Many, if not most violent situations can be better understood in the context of the widely accepted criminological theory posited by Marvin Wolfgang "victim-precipitated homicide". I find it useful to utilize Wolfgang's concept in a broader way as "Victim-Precipitated-Violence." (This concept, of course, includes "Victim-Precipitated-Homicide.") In the context of violent gang behavior, simply stated, this theory pertains to the fact that in a violent gang interaction it is often difficult to ascertain who will wind-up as the perpetrator and who will become the victim. The individual who is the initial victim of a violent act, often in self-defense, winds up as the assailant who is to be prosecuted.

A Case-In-Point. A case I worked on delineates this issue. On an evening in 1997, Two

opposing gangster factions met in a drug-dealers house to consummate a drug deal. There is evidence that one faction, comprised of three individuals, had some affiliation with the LA Crips, and the opposing two individuals were affiliated with the LA Bloods gang--two enemy gangs. There was apparently a major unanticipated misunderstanding between the factions. All of the participants had money to buy drugs, and no one had any drugs to sell. Apparently, based on murky court testimony, a conflict ensued with guns being pulled, and used to threaten each other. The evidence is unclear, however, the Blood's gang group of two gained control of the situation. In fear of their life, then or at a later time involving a reprisal, they apparently decided to kill the opposing group. They bound their three "enemies" with duct-tape, put them in two cars, and drove to a remote area outside of the city. They then placed their 3 "enemies" face down on the ground and shot them each in the head. Two of the three, died immediately. The one potential victim who survived the execution had an Afro haircut. Either because they were poor shots, or they miscalculated because of the haircut, the bullet grazed the survivor's head and he lived to be the main witness in the homicide case against the shooters. The shooters, were convicted of 1st degree murder.

I was hired by the two defense attorneys for one of the defendants in the sentencing phase of the trial. Only two outcomes were possible--execution by the State or life imprisonment. After reviewing the evidence, and interviewing the defendant, who I will call Ed, I came to several conclusions about his participation in the homicide--and several possible factors that would mitigate against his receiving the death penalty

The murder situation that Ed was involved in can be understood in the context of "Victim-Precipitated-Homicide." In this context my testimony simply stated that in many gang violent interactions it is often difficult to ascertain who will wind-up as the perpetrator and who will become the victim. The individual who is the initial victim of a violent act, often in self-defense, winds up as the assailant. In this case, Ed and his partner, after being initially attacked by the three opposing individuals apparently acquired the upper hand and gained control of the situation. Now in charge, and fearing the deadly possibility that if the three who ultimately became their victims were released from their control, they would return to kill them. They felt, according to Ed, in the context of gang culture, that it was incumbent on them to eliminate their perceived enemies.

In the penalty phase of a capital case testimony can be presented in the form of what are known as "mitigating factors." In Ed's case I testified on the issue of "victim-precipitated violence", along with my analysis of Ed's case history. The judge determined that there was validity to my testimony, and instead of a death sentence, Ed received the penalty of life in prison.

SUMMARY and CONCLUSIONS

These are some of the legal and sociological arguments that can be effectively employed by a gang or violence expert-witness in a criminal trial. Although the foregoing concepts do not necessarily produce "slam-dunk" clear decisions in a criminal case --they insert into a case reasonable issues that should be deliberated on in the prosecution of a violent

act. Testimony on these issues by an expert-witness, can aid in the rendering of more judicious verdicts.