

THE JETS AND SHARKS ARE DEAD: STATE STATUTORY RESPONSES TO CRIMINAL STREET GANGS

I. INTRODUCTION

Organized crime in America has progressed through a variety of incarnations, from the outlaw gangs of the Wild West to the glorified gangsters of the early half of this century (Al Capone, John Dillinger) to the Mafia ("La Cosa Nostra"), personified in the 1980s and 1990s by the Gambino crime family and its "Dapper Don," John Gotti. But today, organized crime in America is increasingly controlled by criminal street gangs, a new level of organized crime¹ that consistently outpaces the efforts of law enforcement to control it. A far cry from the dancing, singing Jets and Sharks of *West Side Story*,² these gangs are sophisticated, well-organized criminal enterprises.³ Los Angeles County, California, alone has an estimated 130,000 gang members who accounted for a record 430 of Los Angeles' 1,100 murders in 1992.⁴ Although Los Angeles' gang

1. See *Street Gangs Create New Tier of Organized Crime*, UPI, Oct. 2, 1988, available in LEXIS, Nexis library, UPI File. According to a California State Senate analysis, the "rapid evolution" of criminal street gangs "has created a problem far beyond the capabilities of existing state and local law enforcement resources." *Id.* at *1. The same report noted that organized criminal gangs are laundering their money and investing in legitimate businesses and real estate. *Id.* at *2. The gangs commit crimes such as home robbery, burglary, drug trafficking, witness intimidation, car theft, illegal gambling, loan sharking, money laundering, prostitution and murder. '*Organized Crime*' *Street Gangs Nearly Uncontrollable*, S.F. CHRON., Oct. 3, 1988, at B7. As Los Angeles City Attorney James Hahn observed in 1987, "There is little difference anymore between street gangs and traditional forms of organized crime." Scott Armstrong, *In L.A., Line Blurs Between Street Gangs and Organized Crime*, CHRISTIAN SCI. MONITOR, June 12, 1987, at 8.

2. See *infra* note 50.

3. A 1988 report by the California Attorney General's office observed that many gangs in the state, especially the notorious Crips and Bloods, see *infra* notes 58-65 and accompanying text, "have transformed themselves into well-organized networks." *Street Gangs Create New Tier of Organized Crime*, *supra* note 1, at *2. A six-year study of gangs in Detroit details how gangs in that city "transformed themselves from opportunistic street punks into sophisticated drug-dealing empires that rake in hundreds of millions a year." S.C. Gwynne, *Up from the Streets*, TIME, Apr. 30, 1990, at 34. As Detroit's two most powerful gangs declined in the early 1980s, highly disciplined and more profitable gangs emerged to take their place. "What's sweeping this city are what I call CEOs—covert entrepreneurial organizations," said Carl S. Taylor, who conducted the study. *Id.* "They do not wear gold chains or beepers or Fila sweatsuits anymore. They're probably wearing ragged clothes and driving ratty cars." *Id.* The Detroit gangs eschew the use of gang colors and other overt expressions of gang culture to avoid drawing attention to themselves. It works. City and police officials insist Detroit does not have a major gang problem. *Id.*

4. Richard Lacayo, *Unhealed Wounds*, TIME, Apr. 19, 1993, at 30, 30-31.

problems are by far the most publicized and may be the worst in the nation,⁵ California is far from alone.⁶ Criminal street gangs are found both in big cities⁷ and small towns,⁸ and their members come from a wide

5. "Los Angeles has the worst gang problem and the most gang members," a total of 78,233 in 1990, according to the Los Angeles County Sheriff's Department. Jill Walker, *Los Angeles Isn't Alone in Problems with Gangs*, WASH. POST, July 3, 1990, at A10. South Central Los Angeles, a 43-square-mile section of the city with a population of half a million, is often described as a war zone; of 1988's 462 gang-related murders in Los Angeles County, 107 took place in South Central. Alessandra Stanley, *Los Angeles: All Ganged Up*, TIME, June 18, 1990, at 50. "Though the murder rate does not approach the carnage of Beirut or El Salvador on a per capita basis, it is higher than that of Belfast or Burma." *Id.* The U.S. Army sends its doctors to a South Central hospital to train them in treating gunshot wounds of the type they might encounter on the battlefield. *Id.*

6. "In the past decade in particular, gang membership and activities, gang-related homicides, and gang-related drug trafficking has increased and spread to cities in all 50 states." NATIONAL INSTITUTE OF JUSTICE, U.S. DEP'T OF JUSTICE, SEARCHING FOR ANSWERS: ANNUAL EVALUATION REPORT ON DRUGS AND CRIME 75 (1993) [hereinafter SEARCHING FOR ANSWERS] (citation omitted).

7. In 1991, America's 79 largest cities were home to nearly 4,000 gangs with over 200,000 members who accounted for 36,265 "gang incidents" during that year. *Id.* The long list of major cities plagued by gangs includes, in addition to Los Angeles: Atlanta, Boston, Chicago, Denver, Houston, Kansas City (Mo.), Miami, Milwaukee, Minneapolis, New York and Washington, D.C. Tom Morganthau, *The Drug Gangs*, NEWSWEEK, Mar. 28, 1988, at 20, 22, 25.

The suburbs of big cities such as Chicago are also seeing a rise in gang-related activity. "After years of denying that their communities had gangs, many suburban police officials now acknowledge that the number of gang-related incidents has grown almost as steadily as the population." Debra Rowland et al., *Suburbs Waking Up to Threat of Gangs*, CHI. TRIB., Sept. 22, 1991, at 1, 16. While the earliest suburban gangs were "copy-cats" of their urban counterparts, "hard-core" gangs are becoming an increasing presence in the suburbs. *Id.* "They are still not as advanced out here," said one suburban Chicago police officer, "[s]o if we arrest a few of their leaders, we shut them down for the most part." *Id.*

8. Most, if not all, of the gang activity in small cities and towns is attributable to the expansion of gangs from Los Angeles and elsewhere. Transplanted Los Angeles gang members appeared in Wichita, Kansas, as early as 1989. Jon D. Hull, *No Way Out*, TIME, Aug. 17, 1992, at 40. By 1992, Wichita and surrounding Sedgwick County had 68 gang "sets" with 1,400 members. *Id.* Miami gangs have moved north into smaller Southern cities such as Savannah, Georgia, and Montgomery, Alabama. Morganthau, *supra* note 7, at 25. According to a 1989 report by the federal Bureau of Alcohol, Tobacco and Firearms, more than 30 Los Angeles gangs had established drug trafficking operations in at least 21 states outside California—Alaska, Arizona, Colorado, Florida, Hawaii, Idaho, Illinois, Iowa, Kentucky, Louisiana, Maryland, Missouri, Nebraska, Nevada, New Mexico, Ohio, Oklahoma, Oregon, Texas, Utah and Washington—by the late 1980s. INTELLIGENCE DIVISION, OKLAHOMA STATE BUREAU OF NARCOTICS AND DANGEROUS DRUGS CONTROL, PRELIMINARY ANALYSIS OF THE CRIPS AND BLOODS STREET GANG ACTIVITY IN OKLAHOMA 8 (1991) [hereinafter CRIPS AND BLOODS IN OKLAHOMA] (citation omitted). Jamaican gangs, known as "posses," established operations in Martinsburg, West Virginia (population 13,000), in the mid- to late 1980s, supplied by drug operations in such eastern cities as New York, Miami and, especially, Washington, D.C. (only a 90-minute drive from Martinsburg). "The Jamaicans first arrived in Martinsburg as migrant workers to pick apples and peaches at harvest time, but many stayed on to peddle coke and crack." Mark Miller, *A Jamaican Invasion in West Virginia*, NEWSWEEK, Mar. 28, 1988, at 24; *see also* State v. Rummer, 432 S.E.2d 39, 58 (W. Va. 1993) (Neely, J., dissenting) ("All along the rural corridor that parallels Interstate 95 from

variety of races and nationalities.⁹ These gangs have primarily been involved in drug trafficking,¹⁰ and this activity has been the major reason for the explosion in the number of gangs in the 1980s and 1990s. However, gangs also engage in violent activity, including shootings of rival gang members or former members of the same gang and random violence committed for little or no reason.¹¹ Traditional criminal laws on the state level have been unsuccessful in eliminating or reducing gang activity, largely because of the gangs' organizational structures and their willingness to use violence to achieve their ends.¹²

Florida to New York, the Jamaicans have cornered the crack cocaine network.”).

For a more detailed discussion of gang migration to smaller cities and towns, see Jerome H. Skolnick et al., *Gang Organization and Migration*, in *GANGS: THE ORIGINS AND IMPACT OF CONTEMPORARY YOUTH GANGS IN THE UNITED STATES* 193 (Scott Cummings & Daniel J. Monti eds., 1993) [hereinafter *GANGS*].

9. Gangs tend to be internally racially homogeneous, but there is seemingly a gang for every ethnic group in America. Ethnic gangs are further subdivided among national origin lines, so there are not simply Hispanic gangs, but Puerto Rican, Cuban and Mexican gangs; similarly, under the broad umbrella of Asian gangs, there are Vietnamese, Chinese, and Japanese gangs. See HERBERT C. COVEY ET AL., *JUVENILE GANGS* 49 (1992). Other major ethnic gangs include black/African-American gangs, Jamaican gangs (or “posses”), and white ethnic gangs, which include white supremacists and “skinheads.” See generally *id.* at 51-71. For a more detailed discussion of ethnicity and gangs, see *infra* notes 68-71 and accompanying text.

10. See Morgenthau, *supra* note 7, at 20. Crack cocaine has “transform[ed] some of the country’s toughest street gangs into ghetto-based drug-trafficking organizations.” *Id.* Some have argued that the rise of street gangs in the late twentieth century, using drug trafficking as a primary vehicle, is similar to the emergence of the Mafia during Prohibition, when the organized crime machine built its fortune and reputation through illegal alcohol. *Id.* at 22. “The [ghetto] gangs now have an opportunity provided by the crack explosion and the breakup of [traditional] organized-crime groups. These gangs are where the [Italian] gangs were when they moved into bootlegging.” *Id.* For an alternative view, see BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, *DRUGS, CRIME AND THE JUSTICE SYSTEM* 58 (1992) (“[R]esearch completed to date . . . suggest[s] that drug distribution is not usually an organized activity of youth gangs.”).

11. COVEY ET AL., *supra* note 9, at 27-28. Gang violence has extended even to assaults and shootings of random people simply because they were wearing colors identified with a rival gang. *Id.* at 28.

12. As one observer has noted, “[g]angs are a unique problem in prosecution” chiefly because of their organization and the phenomenon of group, rather than individual, crime. Michael Genelin, *Gang Prosecutions: The Hardest Game in Town*, in *THE GANG INTERVENTION HANDBOOK* 417, 417 (Arnold P. Goldstein & C. Ronald Huff eds., 1993). “We certainly know that group action can terrorize. At the street gang level, the use of gang colors, gang clothing, gang signs, graffiti plastered all over buildings, and the gang’s willingness to use force can intimidate neighborhoods.” *Id.* Witnesses to gang-related crimes are often reluctant to testify or even to come forward with information for fear of reprisal from the gangs. “The gangs consider it a matter of honor to go after any witnesses if one of their members is arrested,” noted one Los Angeles Police Department Detective. Because of this terrorism, the detective added, “we may have a murder committed in broad daylight in front of 20 people, and suddenly those 20 people go blind.” Michael S. Serrill, *The Witness as Target*, *TIME*, Dec. 19, 1983,

Several states have responded to this new form of organized crime by enacting criminal statutes specifically aimed at criminal street gangs. California, home of the "street gang capital of the United States,"¹³ took the lead in this statutory fight against gangs by passing the Street Terrorism Enforcement and Protection Act (STEP Act) in 1988.¹⁴ Similar in structure to the federal Racketeer Influenced and Corrupt Organizations Act (RICO),¹⁵ the STEP Act creates a new substantive crime of participation in criminal street gang activity.¹⁶ It also establishes enhanced sentences for gang-related felonies,¹⁷ provides for forfeiture of gang weapons¹⁸ and allows buildings used by gangs to be declared public or private nuisances.¹⁹

As originally drafted, the STEP Act contained provisions that provided

at 65. Moreover, prison overcrowding on the state level adds to the problem of gang prosecutions. Even when convicted, gang members may serve little or no time in prison. Jim Newton, *U.S. Mounts Sweeping Crackdown on L.A. Gangs*, L.A. TIMES, July 4, 1992, at A1, A27. "What's worse is that for a lot of these guys, you lock them up in state prison, and it's like going to college," observed one federal prosecutor. "They see their families, they deal drugs, they kill people." *Id.*

13. "It is with no sense of pride that I tell you that Los Angeles is the street gang capital of the United States," stated Los Angeles District Attorney Ira Reiner at a 1987 press conference. Michael D. Harris, *Prosecutors Seek to Make Street Gangs Illegal*, UPI, June 8, 1987, available in LEXIS, Nexis library, UPI File, at *2.

14. CAL. PENAL CODE §§ 186.20-28 (West Supp. 1994).

15. 18 U.S.C. §§ 1961-1964 (1988 & Supp. IV 1992).

16. See CAL. PENAL CODE § 186.22(a) (West Supp. 1994). This crime is committed when an individual participates in a criminal street gang with knowledge that its members engage in a pattern of criminal street gang activity and willfully promotes, furthers or assists in the commission of felonies by the members of the gang. *Id.* A pattern of criminal street gang activity is defined as the commission of two or more predicate offenses within three years where each offense was committed on separate occasions or by two or more persons. *Id.* § 186.22(e). For a list of STEP Act predicate crimes, see *id.* § 186.22(e)(1)-(8).

The substantive crime of participation in a criminal street gang parallels 18 U.S.C. § 1961, which defines a "pattern of racketeering activity" under RICO as the commission of at least two predicate "acts of racketeering activity." 18 U.S.C. § 1961(5) (1993). RICO predicate crimes include a long list of federal crimes, as well as "any act or threat which involves murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotics or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year." 18 U.S.C. § 1961(1) (Supp. IV 1992). Because of the state predicate crimes contained in RICO, it has been used with considerable success against criminal street gangs. See *infra* notes 228-33 and accompanying text.

17. CAL. PENAL CODE § 186.22(b) (West Supp. 1994). The additional penalties are imposed for the commission of a felony "for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." *Id.* Additional enhancements are imposed if the felony in question was committed within 1,000 feet of a school during regular school hours. *Id.*

18. See *id.* § 186.22a(e).

19. See *id.* § 186.22a(a).

for the forfeiture of gang members' property if such property was acquired through criminal gang activity.²⁰ In fact, the legislative findings contained in the STEP Act cite forfeiture as an effective means to punish and deter gang activity.²¹ These forfeiture provisions, however, were removed during the legislative process²² and have not been replaced in subsequent sessions. Yet RICO and the federal Continuing Criminal Enterprise (CCE) statute²³ have amply demonstrated that criminal forfeiture provisions are a powerful crime-fighting tool, especially when directed at organized crime, because they eliminate an individual's economic control over a criminal enterprise.²⁴ Increasingly, criminal street gangs have become part of the entrenched social order of inner cities²⁵ and, because of their tremendous

20 Jerry Gillam, *Assembly Panel Softens, Approves Anti-Gang Measure*, L.A. TIMES, Aug. 2, 1988, at 16.

21 See CAL. PENAL CODE § 186.21 (West Supp. 1994). "The Legislature further finds that an effective means of punishing and deterring the criminal activities of street gangs is through forfeiture of the profits, proceeds, and instrumentalities acquired, accumulated or used by street gangs." *Id.*

22 Gillam, *supra* note 20, at 16. The Assembly Public Safety Committee approved the bill after the forfeiture provisions were removed by the author of the bill because of concerns that innocent relatives of gang members would be adversely affected. *Id.*

23 21 U.S.C. § 848 (1988). The Continuing Criminal Enterprise statute establishes criminal liability for the commission of a drug felony that is part of a continuing series of such violations, provided that the pattern of activity takes place in concert with at least five other people and the defendant occupies an organizational, supervisory or management position with respect to that group. *Id.*

24. See generally Michael Goldsmith & Mark Jay Linderman, *Asset Forfeiture and Third Party Rights: The Need for Further Law Reform*, 1989 DUKE L.J. 1254. "Asset forfeiture has become an important weapon in the fight against narcotics trafficking and racketeering," observe Goldsmith and Linderman. *Id.* at 1254. "Forfeiture laws are one of the few effective ways to combat narcotics racketeers. Driven by enormous potential profits, drug dealers are not deterred by traditional criminal sanctions such as fines and incarceration." *Id.* at 1255-56.

25. Anastasia Toufexis, *Our Violent Kids: A Rise in Brutal Crimes by the Young Shakes the Soul of Society*, TIME, June 12, 1989, at 54. Several sources attribute the rise of criminal street gangs, at least in part, to the decline of the nuclear family in the inner city. Social institutions such as the family, the school and the church have traditionally served as the moral foundation of society, controlling aggressive behavior and fostering respect for the law. *Id.* "But these moral pillars are crumbling. Too many children are growing up in families headed by one overburdened parent, usually the mother." *Id.* Moreover, even if two parents are present, their drug and alcohol use and busy schedules foster neglect or outright abuse and are hardly conducive to the family's traditional controlling function. "The result is that children do not get the nurturing, guidance or supervision necessary to instill a set of values and a proper code of behavior." *Id.*

Gangs frequently fill the void left by the lack of family structure. James Diego Vigil observes that "[t]he gang has become a 'spontaneous' street social unit that fills a void left by families under stress [Gangs] attach [youths] to 'something' when everything else is not working or has failed." JAMES DIEGO VIGIL, *BARRIO GANGS: STREET LIFE AND IDENTITY IN SOUTHERN CALIFORNIA* 90 (1988). "The gang is your family," echoed one L.A. gang member. "If you're my homeboy, I fight for you, no matter what the odds. If you're the enemy, it's do or die." Hull, *supra* note 8, at 22.

profitability, have expanded to other, less urban areas of the country.²⁶ Therefore, strong measures such as forfeiture provisions are therefore necessary to combat criminal street gang activity. With such provisions, anti-gang statutes would not merely directly punish those who commit specific gang-related acts, but would also strike at the gang itself and reduce or eliminate its potential for monetary gain.

Along with California, several other states have enacted their own anti-gang statutes,²⁷ many of them based on the STEP Act.²⁸ Some states, however, have made substantial and troubling departures from the California model. For instance, in providing sentence enhancements for gang-related crimes, Florida,²⁹ South Dakota³⁰ and Illinois³¹ use more expansive definitions of gang membership than does California's STEP Act.

26. Morganthau, *supra* note 7, at 25. "There is . . . little question that some of the more aggressive big-city gangs have begun to spread the drug trade into the heartland . . . Enriched by their drug profits, big-city gangs can now easily afford the overhead of far-flung operations." *Id.*

27. In addition to California, twelve states have enacted some sort of criminal statute directed expressly toward criminal street gang activity or added provisions to existing laws that specifically address or punish gang-related activity. *See* ARK. CODE ANN. § 5-74-104 (Michie Supp. 1993); FLA. STAT. ANN. §§ 874.01-08 (West 1994); GA. CODE ANN. §§ 16-15-1 to -5 (1992); ILL. ANN. STAT. ch. 730, para. 5/5-5-3(c)(2)(J) (Smith-Hurd Supp. 1994); IND. CODE ANN. §§ 35-45-9-1 to -4 (Burns Supp. 1995); IOWA CODE ANN. § 723A.2 (West Supp. 1993); LA. REV. STAT. ANN. §§ 15:1401-1405 (West 1992); MINN. STAT. ANN. § 609.229 (West Supp. 1994); MO. ANN. STAT. §§ 578.421-430 (Vernon Supp. 1994); NEV. REV. STAT. § 193.168 (Michie Supp. 1993); OKLA. STAT. ANN. tit. 21, § 856D-F (West Supp. 1995); S.D. CODIFIED LAWS ANN. §§ 22-10-14 to -15 (Supp. 1994).

At one time, Texas belonged on this list. However, a 1993 amendment to the Texas Penal Code removed all the gang-specific provisions of the Texas Organized Criminal Activity statute. *See* TEX. PENAL CODE ANN. §§ 71.01 (West Supp. 1994).

28. The anti-gang statutes of Georgia, Louisiana and Missouri are nearly identical in structure to the California law. *See* GA. CODE ANN. §§ 16-15-1 to -5 (1992); LA. REV. STAT. ANN. §§ 15:1401-1405 (West 1992); MO. ANN. STAT. §§ 578.421-430 (Vernon Supp. 1994). Others are more loosely based on the California approach. Iowa's criminal street gang statute, for example, establishes the crime of street gang participation based on similar predicate crimes, but does not contain sentence enhancements, nuisance sections or weapon forfeiture provisions. IOWA CODE ANN. § 723A.2 (West Supp. 1993).

29. FLA. STAT. ANN. § 874.03 (West 1994).

30. S.D. CODIFIED LAWS ANN. § 22-10-14 (Supp. 1994).

31. Illinois' state sentencing code prohibits the granting of probation, periodic imprisonment, or conditional discharge for gang-related forcible felonies. *See* ILL. ANN. STAT. ch. 730, para. 5/5-5-3(c)(2)(J) (Smith-Hurd 1992). "Organized gang" was originally defined as an association of five or more people, with an established hierarchy, that encourages its members to commit crimes or provides support to those members that commit crimes. *Id.* In 1993, this definition was amended to conform with the definition of "streetgang" under the Illinois Streetgang Terrorism Omnibus Prevention Act (the STOP Act), which provided a civil remedy for those affected by gang activity. *Id.* ch. 740, para. 147/10 (Smith-Hurd Supp. 1994) (Illinois STOP Act definition); *Id.* ch. 730, para. 5/5-5-3(c)(2)(J) (Smith-Hurd Supp. 1994) (referencing the STOP Act for the proper definition of organized gang); *see also infra* notes 148-50 and accompanying text.

Because they impose additional punishments for mere association with others, these laws are subject to constitutional challenge on the grounds that they violate due process and freedom of association.³²

A variety of constitutional and practical concerns have been raised about both the STEP Act and other states' anti-gang statutes. In particular, the substantive crime of participation in criminal street gang activity has been challenged on grounds of vagueness and overbreadth,³³ violation of due process,³⁴ violation of the right of free association,³⁵ and double jeopardy.³⁶ Practical concerns have also been raised about the difficulty of

32. The Florida, Illinois and South Dakota anti-gang laws have not yet been challenged on these grounds. California's STEP Act, by contrast, has consistently been upheld against these and similar challenges, as have the anti-gang statutes of Indiana and Iowa. *See infra* Part III.

33. The overbreadth argument is based on the premise that, although the law is directed at gangs whose primary activity is criminal conduct, it sweeps too broadly and chills other, constitutionally protected activities such as freedom of association. Challengers on vagueness grounds argue that the provisions of the Act are not defined well enough to provide notice that certain conduct is illegal. Vagueness and overbreadth, usually brought together, have been the primary challenges to the California anti-gang statute, but the STEP Act has thus far survived all such challenges. *See People v. Gamez*, 286 Cal. Rptr. 894 (Ct. App. 1991); *Jackson v. State*, 634 N.E.2d 532 (Ind. Ct. App. 1994) (holding Indiana Criminal Gang Activity statute not void for vagueness or overbreadth); *Helton v. State*, 624 N.E.2d 499 (Ind. Ct. App. 1993) (holding same); *State v. Walker*, 506 N.W.2d 430 (Iowa 1993) (rejecting vagueness and overbreadth challenge to Iowa criminal street gang statute).

34. Due process challengers to anti-gang laws argue that the statutes punish individuals because of their association with others, rather than focusing on specific intent to commit a crime or to aid a criminal organization. These challenges have also proved unsuccessful. *See, e.g., Walker*, 506 N.W.2d at 433; *Helton*, 624 N.E.2d. at 508-09.

35. Freedom of association is the constitutionally protected right most often cited in challenges based on overbreadth. *See supra* note 33 and accompanying text. Again, these challenges have not succeeded. Some commentators have argued that anti-gang laws would not survive free-association challenges, should any develop, before the U.S. Supreme Court because such challenges would be reviewed under a strict scrutiny standard. *See Alexander A. Molina, Comment, California's Anti-Gang Street Terrorism Enforcement and Prevention Act: One Step Forward, Two Steps Back?*, 22 SW. U.L. REV. 457, 466-69 (1993).

36. Anti-gang legislation may be subject to challenge on the grounds that it creates multiple punishments for the same conduct and thus violates the Double Jeopardy Clause of the Fifth Amendment. Iowa's criminal street gang statute recently survived such a challenge. In *State v. Lewis*, 514 N.W.2d 63 (Iowa 1994), the defendant argued that the Double Jeopardy Clause prevented the imposition of consecutive sentences for convictions of terrorism, *see* IOWA CODE ANN. § 708.6 (West 1993), and criminal gang participation (which was based on the terrorism charge) because the two crimes were the "same" under double jeopardy analysis. *Id.* at 68-69.

The Iowa Supreme Court concluded that terrorism, when it serves as an underlying offense for a charge of criminal gang participation, is a lesser included offense of criminal gang participation because the greater crime cannot be committed without also committing the lesser offense. Therefore, the two crimes were the "same" for double jeopardy purposes. *Id.* at 69. However, the court also determined that the legislature clearly intended to impose multiple punishments for the "same offense" and, thus, double jeopardy was not violated. *Id.* Because criminal gang participation is classified as only a Class

establishing gang membership and patterns of gang activity.³⁷

This Note contends that anti-gang statutes should follow the basic structure of California's STEP Act. However, anti-gang statutes should also contain strong criminal forfeiture provisions, similar to those found in the federal RICO and CCE statutes, which allow the forfeiture of interests acquired through criminal street gang activity.³⁸ Such criminal forfeiture provisions must be carefully drafted to protect the rights of innocent third parties. Furthermore, changes should be made to current statutory definitions of gangs and gang activity to resolve the constitutional issues that have been raised concerning anti-gang legislation. These changes in existing state anti-gang statutes would enable law enforcement to strike at the heart of criminal street gangs while protecting the constitutional rights of gang members and their relatives.

Part II of this Note describes the rise of criminal street gang activity in the United States and the state statutory responses to this growing problem. Part III addresses the constitutional and practical concerns that have been raised about anti-gang statutes in California and elsewhere. Part IV discusses RICO and other laws designed to fight organized criminal activity and explores the success of these laws. Finally, Part V outlines a Model Street Gang Prevention Act and shows how it will effectively address, reduce and prevent America's newest form of organized crime.

D felony, and thus carries a lesser penalty than most of its predicate crimes, the legislature must have intended to impose multiple punishments. "In most cases the resulting sentence would be the same as, or less severe than, the sentence for criminal gang participation" unless multiple punishments were imposed. *Id.*

For a discussion of the similarities and differences between Iowa's anti-gang statute and the California STEP Act, see *supra* note 28.

37. Expert testimony by police officers has often been used to establish gang activity and association, and in several cases such testimony has been based, at least in part, on hearsay. See, e.g., *Gamez*, 286 Cal. Rptr. at 898-99. Provided that hearsay forms only a portion of the officers' opinions and is not presented for the truth of the matters asserted, courts have upheld the use of such evidence. *Id.* at 899-900. Given that this may be the primary, if not the sole, evidence supporting a charge of participating in criminal street gang activity, courts applying anti-gang statutes face an uncomfortable choice between invalidating a powerful anti-gang tool and violating criminal defendants' rights of confrontation under the Sixth Amendment. See generally Susan L. Burrell, *Gang Evidence: Issues for Criminal Defense*, 30 SANTA CLARA L. REV. 739 (1990).

38. Florida's Street Terrorism Enforcement and Protection Act is the only state anti-gang statute that currently allows criminal forfeiture. The statute provides: "Any profits, proceeds, or instrumentalities of criminal activity of any criminal street gang shall be subject to seizure and forfeiture under the Florida Contraband Forfeiture Act." FLA. STAT. ANN. § 874.08 (West 1994).

II. HISTORY

A. *The Growth of Criminal Street Gangs in America*

Although gang participation in organized criminal activity has exploded in the last quarter of this century, and state laws aimed specifically at gangs and their criminal activities are a fairly recent innovation, gangs are nothing new. Gangs were around long before they began participating in organized crime, and thus any criminal statute designed to eliminate gangs must address the root causes of gang activity.³⁹

The definition of the term "gang" has always been a subject of debate.⁴⁰ Definitions have varied widely depending upon the type of gang "expert" doing the defining.⁴¹ Despite this variation, it is clear that gangs are not

39. For a discussion of these root causes, see *infra* notes 82-89 and accompanying text.

40. One researcher claims that "there has never been anything close to a consensus on the definition of a gang by scholars, criminal justice workers, or the general public." COVEY ET AL., *supra* note 9, at 3-4. Early gang researchers used the term very generally and defined gangs as loosely organized, spontaneous groups. *Id.* at 3. One major gang scholar of the 1920s defined a gang as an interstitial group originally formed spontaneously, and then integrated through conflict. It is characterized by the following types of behavior: meeting face to face, milling, movement through space as a unit, conflict, and planning. The result of this collective behavior is the development of tradition, unreflective internal structure, *esprit de corps*, solidarity, morale, group awareness, and attachment to a local territory.

FREDERIC M. THRASHER, *THE GANG* 57 (2d ed. 1960). However, this definition has been criticized as inadequate by later scholars, one of whom notes that "[i]t would be little exaggeration to suggest that according to [this definition], the Harvard and Notre Dame football teams could be regarded as gangs." COVEY ET AL., *supra* note 9, at 5-6.

41. For example, consider the differences in these two definitions, the first from the Los Angeles County police and the second from a sociologist and gang researcher:

[1] A gang is a group of people who form an allegiance for a common purpose and engage in acts injurious to public health and public morals, who pervert or obstruct justice or the due administration of laws, or engage in (or have engaged in) criminal activity, either individually or collectively, and who create an atmosphere of fear and intimidation within the community.

[2] [A gang is] . . . a group whose members meet together with some regularity, over time, on the basis of group-defined criteria of membership and group-determined organizational structure, usually with some sense of territoriality.

Joan Moore, *Gangs, Drugs, and Violence*, in *GANGS*, *supra* note 8, at 27, 30 (footnotes omitted). Sociologists tend to exclude from their definitions any references to crime or delinquency, or to conventional behavior for that matter, because, as the author of the second definition stated, "these usually are what we wish to explain." *Id.* Police, on the other hand, are in the business of fighting and preventing crime, and so their definitions are based on criminal conduct. *Id.* For the purposes of this Note, the author will not select a particular definition of the term "gang," especially because the state laws to be discussed vary in their statutory definitions. It is sufficient to say that the criminal street gangs that are the subject of this Note will more closely fit the police definition than the sociologist's definition.

a new problem. Historians have found evidence of gang activity in Europe as early as the fourteenth and fifteenth centuries,⁴² and gangs may have arrived in America not long after the Pilgrims.⁴³ The criminal street gang first appeared in the United States in the early nineteenth century.⁴⁴ These street gangs had much in common with the modern gangs that would follow, especially with regard to their criminal activity and internal and external behavior.⁴⁵

In the early twentieth century, gangs became significant enough to prompt public concern and research.⁴⁶ At the time, gang researchers believed that gangs were found only in certain types of neighbor-

42. COVEY ET AL., *supra* note 9, at 90. Not only were gangs present in the Middle Ages, they were a common problem. Medieval gangs were "every bit as violent as contemporary gangs," and also stole livestock, rape, robbed and committed extortion. *Id.* The major difference between the gangs of the Middle Ages and their modern counterparts is that medieval gang killings "were more physically direct and personal than today's drive-by shootings." *Id.*

43. *Id.* at 91. Group or gang delinquency was a problem in New England as early as the seventeenth and eighteenth centuries, and was prevalent enough in late eighteenth-century Philadelphia that the citizens called a meeting to address the threat created by "bands of youth hooligans." *Id.* at 91-92. These gangs were involved in drinking, fighting, theft, and sexual experimentation. *Id.* at 92.

44. Historian H. Asbury claims that the first American gang was New York's "Forty Thieves." *Id.* at 92. Early American gangs battled against their rival gangs and counted theft, gambling and robbery among their primary activities. *Id.* American gangs of the 1870s often were affiliated with saloons and political parties, using terrorism and crime to reduce competition for the former and strong-arm tactics to affect election results for the latter. *Id.* at 93. In return for these activities, gangs were either paid or protected from police and public officials. *Id.*

45. Nineteenth century gangs were well-organized and territorial. They had regular meeting places and were organized according to age. *Id.* at 94. They also shared with their modern counterparts a distrust of outsiders and a tendency to name their gangs after their neighborhoods. Like modern gangs, some early gangs had female satellite gangs. *Id.*

The arrival of various immigrant groups in America during this period—Italians, Jews, Irish, Chinese, and others—led to gangs that were organized, as they still are, along racial and ethnic lines. *Id.* at 93. Ethnic gangs provided economic and political opportunities for immigrant youths at a time when mainstream society was unwilling to do so. *Id.*; see also THRASHER, *supra* note 40, at 252-54.

46. Several gang studies appeared in the first third of the twentieth century, most notably Frederic Thrasher's landmark work, *The Gang*, *supra* note 40, which has had a lasting impact on gang research even to this day. "Because Thrasher's research on the gang was a general survey of all its aspects," notes one contemporary gang researcher, "his work was not only the most important of the time, it has remained the major influence on gang research ever since." MARTIN SANCHEZ JANKOWSKI, *ISLANDS IN THE STREET: GANGS AND AMERICAN URBAN SOCIETY* 3 (1991).

The gang researchers of the early 1900s confronted a fundamental tension (which still exists today) in gang analysis resulting from the tendency to dismiss the legitimacy and sophistication of criminal street gangs despite their status as well-organized, solidly entrenched social units. Early researchers described gangs in terms suggesting that gangs were spontaneous and informally organized. Their detailed studies, however, showed the degree of sophistication and longevity of which gangs were capable, even if the researchers themselves did not, or could not, acknowledge it. Daniel J. Monti, *Origins and Problems of Gang Research in the United States*, in *GANGS*, *supra* note 8, at 3, 9.

hoods—primarily lower-class neighborhoods with high concentrations of minorities and immigrants.⁴⁷ These neighborhoods suffered from many of the same problems plaguing today's inner cities: overcrowding, poor living conditions and high industrialization.⁴⁸ Today, gangs are still thought of as an urban problem,⁴⁹ despite their spread into less urbanized areas.

By the 1950s, public awareness of gangs had grown considerably, fueled in large part by the images of gangs in movies and other forms of popular culture.⁵⁰ Meanwhile, real-life gangs were increasing in number and effect.⁵¹ In the 1960s, the mass media also took a greater interest in gang activity, and gang prevention thus became a higher priority at the national

47. Thrasher and his contemporaries viewed slums as disorganized neighborhoods, a characterization based in part on the periodic clashes between racial or ethnic groups when one group moved into a neighborhood already occupied by another group. These were the areas, they felt, where gangs were most likely to be found. Monti, *supra* note 46, at 8. As gang research progressed, however, gangs were discovered in neighborhoods that were stable, though poor, where the same ethnic group had lived for an extended period of time. Hispanic gangs in the *barrios* of the southwestern United States are a prominent example of gang activity in the so-called "stable slums." *Id.* For a more detailed discussion of Hispanic gang history and activity in Southern California, see generally VIGIL, *supra* note 25.

48. Monti, *supra* note 46, at 8.

49. "Researchers generally have not found gangs, or have not looked for them, in places other than slums. Where gangs are found, or thought to be found, implies much about the organization, behavior, and thinking of the gangs and the community of which they are part." *Id.* at 9. Gang members are often ascribed characteristics that outsiders view as typical of slum areas: rudeness, aggressiveness, criminal activity, parochialness and disorganization. "Gangs remain a metaphor for all that is seductive and dangerous about ethnic groups and the slums they inhabit." *Id.* (footnote omitted). This helps explain the emergence of "copy-cat" gangs in the suburbs. See *supra* note 7.

50. The most prominent examples of gangs in popular culture in the 1950s are gang movies, such as *The Wild Ones*, *Rebel Without a Cause*, and *The Blackboard Jungle*. COVEY, ET AL., *supra* note 9, at 99. Perhaps the most enduring portrayal of street gangs in American popular culture, however, is the musical (and later movie) *West Side Story*, which made its Broadway debut in 1957. A retelling of the Romeo and Juliet story set in New York with rival gangs substituted for the Montagues and Capulets, *West Side Story* made the fictional Jets and Sharks the most well-known street gangs in America, despite inroads by the real-life Crips and Bloods. See *infra* notes 58-65 and accompanying text. *West Side Story* and other popular examples of gang culture in the 1950s, one researcher observed, created "the . . . image of a group of kids whose members were aggressive and rebellious—but appealing." By the 1990s, that image had merged with the concept of gangs as well-disciplined criminal organizations, to the point where "the gang is seen as an organized drug enterprise staffed by unpredictably aggressive and rebellious young people." Moore, *supra* note 41, at 28.

51. During the 1950s, gangs were prominent in major cities such as Chicago, Los Angeles, New York, Philadelphia and Washington, D.C. FLORIDA HOUSE OF REPRESENTATIVES COMMITTEE ON YOUTH, ISSUE PAPER: YOUTH GANGS IN FLORIDA 6 (1987) [hereinafter YOUTH GANGS IN FLORIDA]. Some major gangs also began expanding into other cities. Examples include the Blackstone Rangers and the Latin Kings, Chicago "supergangs" which started smaller gangs elsewhere in the Midwest. COVEY ET AL., *supra* note 9, at 99.

level.⁵² After a decline in traditional gang activity in the late 1960s,⁵³ gangs reasserted themselves in the 1970s, although they did not receive much attention from the media or public officials until the 1980s.⁵⁴ During the 1970s, gangs began to evolve into their present shape, moving away from ritualistic gang violence⁵⁵ and towards organized criminal activity committed for financial gain.⁵⁶

In the early 1980s, gangs were recognized as a major societal problem and organized criminal force in Los Angeles.⁵⁷ Gang activity in Los Angeles was and is dominated by the Crips and Bloods, legendary gangs and bitter rivals.⁵⁸ The Crips trace their origins back to 1969, when the

52. COVEY ET AL., *supra* note 9, at 100. Large, inner-city gangs such as the Blackstone Rangers, the Devil's Disciples and the Vice Lords were the focus of this increased attention from the mass media. *Id.*

53. *Id.* Many gangs became more politically active during this period, and some have suggested this new focus contributed to the decline in traditional gang activity. "People expected youths who were drawn from the same strata (oppressed, minority, lower class youths) as gang members to be involved in social reform and civil rights movements." *Id.* Other explanations given for the decline in gang activity in the late 1960s include increased drug use by gang members to the exclusion of other activities; the effectiveness of intervention programs and police gang control measures (an unlikely reason, given the reemergence of gangs after the 1960s); and even the suggestion that gangs were not really in decline, but were only perceived to be so because of changes in the way gangs were defined. *Id.* at 101.

54. *Id.* Some have suggested that high unemployment in the 1970s contributed to the resurgence of criminal street gangs. *Id.* (citation omitted).

55. This is not to suggest that gang violence in general decreased in the 1970s. In fact, gangs became more violent, used more sophisticated weapons and began to target "ordinary citizens" for much of their violent activity. YOUTH GANGS IN FLORIDA, *supra* note 51, at 7; *see also* COVEY ET AL., *supra* note 9, at 101.

56. COVEY ET AL., *supra* note 9, at 101. Gang turf also became less symbolic and more important on an economic level as violence was used to gain control of markets for drugs and other illegal services. *Id.*

57. A 1981 article in *Time* reported roughly 350 gangs with a total of 20,000-30,000 members in Los Angeles. Moreover, youths accounted for 60% of the violent street crime in Los Angeles county. Jane O'Reilly, *Combat at Hollywood and Vine*, *TIME*, Aug. 24, 1981, at 27. (Almost six years to the day later, *Time* reported that Los Angeles had 200 gangs with 12,000 members, which it said was a 25 percent increase over 1980. Jon D. Hull, *Life and Death with the Gangs*, *TIME*, Aug. 24, 1987, at 21. This illustrates a major problem with gang study and response: inconsistent statistics. *See* Walker, *supra* note 5, at A10 (noting that definitions of gang activity vary among communities, providing conflicting statistics).) These gangs were described as very violent, with attacks triggered by "the slightest insult," whether actual or illusory. O'Reilly, *supra*, at 27. "The protection of turf and machismo honor are the pretexts; baseball bats, screw drivers, knives, cheap guns and especially tire irons are the weapons." Innocent bystanders were increasingly victimized by this new wave of gang violence. *Id.* at 27.

58. The Crips and Bloods "are the two most widely known juvenile gangs operating in the United States in the late 1980s and early 1990s." COVEY ET AL., *supra* note 9, at 52. Much of the public perception and uneasiness about the two gangs stems, in fact, from their violent rivalry. "Crips-Bloods conflicts over drug trafficking have taken the form of urban guerilla warfare, with drive-by shootings,

first Crip gang was formed at Washington High School in the Compton area of Los Angeles.⁵⁹ The Bloods began as the Pirus, a rival to the Crips in Compton.⁶⁰ As other non-Crip gangs joined forces with the Pirus, the whole organization became known as the Bloods.⁶¹ Both groups have evolved into national organizations of local gangs,⁶² which are called "sets."⁶³

The Crips and Bloods' initial criminal activity consisted of extortion, burglary and robbery, but during the drug boom in the United States in the early 1980s, both gangs had established the organizational structure to become major players in the growing cocaine market.⁶⁴ This new focus

turf battles, and the killing of informers as common results of their conflicts." *Id.*

59. CRIPS AND BLOODS IN OKLAHOMA, *supra* note 8, at 3. This first Crip gang mainly engaged in extortion, assault and robbery. *Id.* Several theories exist for the origin of the Crips name. Some claim it comes from the movie *Tales from the Crypt*; others contend it is short for "cripples," because early gang members carried canes to identify themselves; and still another theory suggests it was derived from "kryptonite," which is "the substance more powerful than Superman." *Id.* at 3-4. Blue, the Crips' identifying color, is said to come from the school colors of Washington High. *Id.* at 4.

60. *Id.* at 4. The name "Pirus" was taken from a major street in Compton. Bloods in Compton still call themselves Pirus. *Id.*

61. Bloods wear red, and again the theory is that the color is taken from a local high school, Centennial High in Compton. *Id.*

62. COVEY ET AL., *supra* note 9, at 52.

63. As one observer notes, the Crips and Bloods are not really gangs in the strictest sense of the word. Morganthau, *supra* note 7, at 23. "Instead, the names denote legendary confederations among hundreds of subgroups, or 'sets.'" *Id.* The sets are organized geographically according to neighborhood, and although a few have more than 100 members, most sets are only 20 to 30 strong. "Groups like the Crips and Bloods are no longer street gangs in the traditional sense of the term," said California Attorney General John Van de Kamp in 1988. "They are far-flung [drug] distribution networks . . . with elaborate organizations and a murderous profit motive for eliminating the competition." *Van de Kamp Backs Tougher Anti-Gang Laws*, SACRAMENTO BEE, Sept. 7, 1988, at A3.

64. CRIPS AND BLOODS IN OKLAHOMA, *supra* note 8, at 4. Some Los Angeles gang members claimed that between 15 and 20 high-level gang members controlled the entire cocaine trade in south central Los Angeles in 1988, a claim law enforcement officials did not dispute. Morganthau, *supra* note 7, at 24. An LAPD official said that 75 to 100 Los Angeles gangs were actively involved in the distribution of cocaine at that time. *Id.* Drug trafficking provided money for the expansion of both gangs to other areas of California and the United States, *see supra* note 8, and resulted in distribution arrangements between Colombian cocaine sources and members of the Crips and Bloods. CRIPS AND BLOODS IN OKLAHOMA, *supra* note 8, at 8. The level of trust between the Colombian producers and their Los Angeles connections is so great that the Colombians are willing to sell drugs to the gang members on a consignment basis. Morganthau, *supra* note 7, at 24-25. These direct connections, at wholesale prices, give the big-city gangs a major competitive advantage over their competition in smaller cities, and the larger gangs are better armed as well. *Id.* at 25.

One study, however, suggests that drug trafficking is not the *raison d'être* of Southern California gangs. Rather, gang members engage in drug dealing as individuals, but such activity is entirely optional. "The gang doesn't sell drugs. Individuals or groups do." Skolnick et al., *supra* note 8, at 213. This view, however, may be suspect insofar as it is based on the authors' interviews with gang members

raised the stakes of traditional turf battles. Conflicts were no longer just about defending the neighborhood but were driven by market forces, such as protecting an established cocaine market or expanding into a new one.⁶⁵

Much as the word "gang" defies a simple definition,⁶⁶ the landscape of criminal street gang activity in America is varied and not easily subject to generalization.⁶⁷ However, several identifiable trends have emerged. Although studies have determined that African-Americans and Hispanics are disproportionately involved in gang activity,⁶⁸ gangs encompass a

in California prisons and youth facilities. Because of the "well-developed and virtually sacrosanct sense of trust inhering in the homeboy relationship," *id.* at 199, imprisoned gang members might well be expected to downplay or even deny the role of drug trafficking in their gangs.

At any rate, the authors of the study note that gangs are becoming increasingly organized with respect to drug trafficking. A formalized drug-dealing apprentice system for younger members has developed within the gangs, and the information provided to gang members about the drug trade has increased as gangs expand from their traditional home bases to other areas of the state and country. *Id.* at 199-200. Most tellingly, however, "the web of support expected of and provided to fellow gang members has expanded beyond mere protection, and it has become increasingly economic oriented." This support includes lending money, supplying drugs on consignment, or providing guns for a "mission." *Id.* at 200. These observations suggest that the line between cultural and criminal gangs is becoming increasingly blurred. For a more detailed discussion of the structural differences between gangs, see *infra* note 77 and accompanying text.

65. "The days when rival gangs fought each other only over turf and colors are fading fast," notes a 1988 account of gangs in America. Morgenthau, *supra* note 7, at 23. "In Los Angeles, Chicago, New York and dozens of other cities, gang conflicts have become a form of urban-guerrilla warfare over drug trafficking." *Id.* This violence is both internal and external, with informers and "welshers" punished or killed as readily as competitors. "Gang turf . . . now involves more than bragging rights; it is sales territory." *Id.*; see also *People v. Colon*, 618 N.E.2d 1067, 1074 (Ill. App. Ct. 1993) (Tully, J., dissenting) ("[G]ang members ruthlessly control and terrorize large portions of the City of Chicago . . . Gangs engage in the bloodthirsty, senseless killing of rival gang members simply because of their status in a rival gang or because they have entered territory controlled by a rival gang.").

Interestingly, the high stakes of the drug trade have led to a breakdown of loyalties within gangs as well. "Crips will kill other Crips and Bloods will kill other Bloods if there is drug profit at stake . . . There can be nearly as much variance and conflict between different 'sets' of the same gang as there is between rival gangs." C. Ronald Huff, *Gangs in the United States*, in *THE GANG INTERVENTION HANDBOOK*, *supra* note 12, at 3, 12.

66. See *supra* notes 40-41 and accompanying text.

67. "Urban America's assortment of gang names, symbols, and styles of violence and crime is so varied and often so different from its California counterpart that widespread confusion has resulted. Some police officers even have suggested their jurisdictions do not have a problem because their gangs are nothing like those in Los Angeles." Walker, *supra* note 5, at A10.

68. According to Justice Department surveys in 1991 (covering America's 79 largest cities) and 1989 (45 cities), 87% of gang members are either Hispanic or African-American, a percentage far greater than their numbers in the general population. SEARCHING FOR ANSWERS, *supra* note 6, at 75-76.

Los Angeles' Crips and Bloods, see *supra* notes 58-65, Chicago's El Rukns, see *infra* note 232, and the Vice Lords are prominent examples of African-American gangs. Studies of African-American gangs tend to focus on the role of the gang as a surrogate family and attribute the development of African-American gangs to the growth of the underclass in America's inner cities. See COVEY ET AL., *supra*

tremendous variety of other ethnic and racial classifications, including Jamaican gangs (or "posses"),⁶⁹ white ethnic gangs,⁷⁰ and a wide range of gangs within the general category of Asian gangs.⁷¹ Women have also

note 9, at 51-56. See generally JOHN HAGEDORN & PERRY MACON, *PEOPLE AND FOLKS: GANGS, CRIME AND THE UNDERCLASS IN A RUSTBELT CITY* (1988) (historical study of African-American and Hispanic gangs in Milwaukee).

One source asserts that more is known about Hispanic gangs than any other subcategory of American gang. COVEY ET AL., *supra* note 9, at 57. "Hispanic gangs have existed in this country at least since the turn of the century, and may have become a way of life for some Hispanics." *Id.* (citation omitted). These gangs are characterized by their longevity, both of the gang unit and its members, and are also known for vengefulness and violence. *Id.* at 57, 59. During the 1980s, at least half of Los Angeles County's gangs were Hispanic, with still more in the adjoining counties. VIGIL, *supra* note 25, at 7. See generally James Diego Vigil, *The Established Gang*, in GANGS, *supra* note 8, at 95; JOAN W. MOORE ET AL., *HOMEBOYS: GANGS, DRUGS AND PRISON IN THE BARRIOS OF LOS ANGELES* (1978).

69. The "posses" are a relatively new presence on the American gang landscape and tend to be located on the Eastern seaboard, though they have also been found in northwestern cities such as Seattle and Anchorage, Alaska. COVEY ET AL., *supra* note 9, at 71. As of 1988, there were 30-40 posses, with about 5,000 members, operating in the United States. Morgenthau, *supra* note 7, at 21. "Clannish, cunning and extraordinarily violent, the Jamaicans are dominating the drug trade in carefully chosen cities from Texas to Alaska." *Id.* Law enforcement officials suggest the posses originated from the slums around Kingston, Jamaica. *Id.* at 25; see also Miller, *supra* note 8, at 24 (describing Jamaican gangs in Martinsburg, West Virginia).

70. White ethnic gangs are not a new development. Most early American gangs were organized along European ethnic lines (Irish, Polish, Italian, etc.), but subsequent literature has largely ignored white gangs, possibly because of bias or identification problems. COVEY ET AL., *supra* note 9, at 64. Skinheads are a prominent example of a modern white ethnic gang. Other types of white ethnic gangs include motorcycle gangs—which "tend to have elaborate rituals, dress codes, and unique values related to women, honor, and motorcycles." *Id.* at 66; see also Daniel J. Monti, *Gangs in More- and Less-Settled Communities*, in GANGS, *supra* note 8 at 219, 239-40 (reporting that white gangs formed in south St. Louis as a response to African-American gangs moving into neighborhood).

71. Every major Asian nationality is represented at some level by gang activity in the United States: Korean, Chinese, Taiwanese, Laotian, Cambodian, Vietnamese, Filipino, and Japanese. COVEY ET AL., *supra* note 9, at 67. These gangs are found primarily in coastal cities with large Asian immigrant populations. *Id.* They have a history of violence, especially among juveniles, and frequently have extensive ties to organized crime. *Id.* Asian gangs are typically organized according to a rigid hierarchy, with several levels of authority and certain members who perform specialized tasks, such as shooters or street managers. *Id.* at 69.

Chinese gangs originated from the "tongs" of the early 1900s. *Id.* at 67. Monetary gain is the primary motive of Chinese gangs, which systematically victimize area businesses "in ways no ordinary street gangs possibly could." Ko-Lin Chin, *Chinese Gangs and Extortion*, in GANGS IN AMERICA 129, 137 (C. Ronald Huff ed., 1990). They are closely associated with powerful community organizations and are often part of national or international networks as well. Chinese gangs "more closely resemble adult criminal organizations than typical youth gangs." *Id.* at 137. For a description of one typical Chinese gang, New York's "Green Dragons," see *United States v. Wong*, Nos. 92-1602, 92-1640, 92-1647 to -1652, 1701, 1994 WL 617584 (2d Cir. Nov. 8, 1994).

By 1991, police in Orange County, California, had identified at least 74 Vietnamese gangs operating in and around their county. Most Vietnamese gangs eschew traditional gang symbols, colors or graffiti, because they draw attention; some gangs even refuse to adopt a name. James Diego Vigil & Steve

become more involved in gangs,⁷² not merely as auxiliaries but as full members, and increasingly are forming their own gangs.⁷³ Many gangs adopt distinctive names, colors and hand signals,⁷⁴ and often use graffiti

Chong Yun, *Vietnamese Youth Gangs in Southern California*, in *GANGS IN AMERICA*, *supra*, at 146, 159. Like Chinese gangs, monetary gain is the primary goal of Vietnamese gangs. These gangs shun drug dealing, instead profiting by car theft and robbing the homes of affluent Vietnamese-Americans. *Id.* at 156-57.

Vietnamese gangs are not restricted to Southern California. One Vietnamese gang, known as Born to Kill (BTK) or the Canal Boys, was centered in New York City's Chinatown in the late 1980s and early 1990s. The gang had cells outside of New York and was responsible for robberies, murders and assaults in Chinatown; Bridgeport, Connecticut; Doraville, Georgia; and Chattanooga, Tennessee. *See United States v. Thai*, 29 F.3d 785, 794-898 (2d Cir. 1994).

72. "Although historical evidence indicates female involvement in gangs, their participation rates have been low." COVEY ET AL., *supra* note 9, at 76. Traditionally, female gang involvement takes one of three forms: the branch or auxiliary gang, in which the female gang is affiliated with an all-male gang; the autonomous, all-female gang; or the mixed-gender gang. *Id.* at 79 (citation omitted). Historians suggest that the auxiliary gangs were the most common form of female gang participation. *Id.* Anne Campbell outlines two broad categories of "gang girls," tomboys and sex objects, with the latter given a broad definition to "include those behaviors or roles that are distinguished by the fact that they conventionally require a sexually attractive female to perform them." Anne Campbell, *Female Participation in Gangs*, in *GANGS IN AMERICA*, *supra* note 71, at 163, 167. Thus, female gang members could be a girlfriend of a male gang member, lure rival gang members with promises of sex, or spy on a rival gang by becoming romantically involved with a member of that gang. *Id.* at 167-68.

73. The wholly autonomous female gang is "far from typical," with the auxiliary still the most common form. Leadership is less formal and structured in female gangs; although the gang members may insist that their gang is a democratic entity without a specific leader, "[o]bservation suggests that some girls clearly have more clout than others, but that this usually is not formalized as a leadership role." Campbell, *supra* note 72, at 177-78. Female gangs do not coerce others into joining and their members "exert strong normative control over one another's sexuality." *Id.* at 179. Violence is a large part of female gangs as well, with initiations consisting of fistfights between the prospective member and a current one. Fights with female members of rival gangs are also common. *Id.* at 178-79.

74. An Illinois State Police report describing the symbolism of a Chicago gang illustrates how complex these practices are:

The Discipline Nation and their affiliates . . . refer to themselves as the Folks, their major insignia is the Six-Pointed Star, and their dress is "right" [meaning it emphasizes the right side of the body]. Their basic color is black and if they wear an earring it will be in the right ear. They wear their hat tilted to the right and one of their favorite hats is the blue Civil War cap, they will wear one glove on the right hand, they may have one pocket on the right side turned inside out and it will be dyed in the gang's color or colors, they will roll up the right pants leg, they may have two of the fingernails on the right hand colored with the gang's colors, the hood of their sweatshirt will be dyed with the gang's colors, their shoes will either be colored or the laces of the right shoe will be in the gang's color, their belt buckle will be loose on the right side, and they may wear a bandanna in the gang's colors anywhere on the right side of their body.

ARNOLD P. GOLDSTEIN, *DELINQUENT GANGS: A PSYCHOLOGICAL PERSPECTIVE* 25 (1991). Gangs use colors to distinguish themselves from other gangs and to foster a sense of cohesiveness within the gang. *Id.*

as a sophisticated form of communication.⁷⁵

Most gangs have some sort of formal organizational structure. This structure may vary greatly from gang to gang, especially among gangs of different ethnicities.⁷⁶ Variations in gang organization are due largely to the differing goals of individual gangs.⁷⁷ Nonetheless, among the common characteristics of gang members are intense competitiveness, mistrust of

75. Like much about contemporary gang culture, gang graffiti has significance that belies its popular perception as infantile vandalism or public nuisance. Gang graffiti provide a rich lode of information for students of gangs and urban life. "They are used by police and social workers to keep track of changes in territory alliances between gangs." Ray Hutchinson, *Blazon Nouveau: Gang Graffiti in the Barrios of Los Angeles and Chicago*, in GANGS, *supra* note 8, at 137, 138. Gang graffiti also provide insight into the structure of the gang, "conflicts and alliances between particular street gangs, and possible linkages among street gangs in different cities and regions of the country." *Id.*

76. See *supra* notes 68-71 and accompanying text.

77. Martin Sanchez Jankowski, in his study of gangs in Los Angeles, Boston and New York, identified three types of organizational structures. The first, called "vertical/hierarchical," divides leadership into three or four categories, with authority derived from one's place in the chain of command. Gangs employing such a structure might be led by a president, followed by the vice president, warlord, and treasurer. Each of these positions has specifically defined roles. JANKOWSKI, *supra* note 46, at 64. This model is used by gangs whose primary interest is monetary gain, and is preferred because it provides more control and efficiency. *Id.* at 68.

Jankowski's second example of gang organization is the "horizontal/commission" model. *Id.* at 66. Although gangs using this organization still have officers, usually four, with specific responsibilities, none of the officers have any more or less authority over the other officers. "What the horizontal organizational structure resembled most was a ruling commission or council." *Id.* (citation omitted). Reasons for use of the horizontal/commission structure vary. It can serve as a transitional phase in a decentralization process from a vertical/hierarchical structure. *Id.* at 70. Jankowski found it popular among Hispanic gangs in Los Angeles. These gangs are generally less interested in accumulating money, which negates some of the appeal of the vertical model. *Id.* Additionally, the presence of a large number of relatives in the same gang creates "considerable difficulty [in] getting members to submit to the authority of one person." *Id.* at 71 (citation omitted).

The third category of organization is called "influential." *Id.* at 66. Under this system, "the formal leadership operated under the guise of informality . . . [T]here was an understanding among the gang members that leadership needed to exist and that the present leadership was legitimate, but there were no written formal duties assigned to the leaders and no titles were assigned to the leadership positions." *Id.* The leaders of these gangs typically base their authority on charisma. *Id.* (citation omitted). Jankowski found the influential structure popular among Irish and Hispanic gangs and, in particular, smaller gangs in which centralized leadership is less important. *Id.* at 75-78.

The vertical/hierarchical structure seems to be the most prevalent and is most relevant to this discussion because of its practical benefits to gangs involved in organized crime. Gangs in Northern California tend to be vertically organized because "[t]he only purpose of Northern California 'gangs' is to facilitate profitable criminal activity." Skolnick et al., *supra* note 8, at 210. Southern California gangs, by contrast, are organized horizontally because they were not originally formed as criminal entities, but as socio-cultural groups. *Id.* at 194-95. Members of such cultural gangs use their gang connections to aid their drug business. They share information about supplies and prices, rely on their fellow gang members for protection and, because of the level of trust inherent in horizontally organized gangs, need not fear that their "homeboys" will betray them to the police or rival gangs. *Id.* at 199.

others, a strong sense of self-reliance, social isolation, and an air of defiance.⁷⁸ Gang members also share many qualities attributable to the American entrepreneurial spirit⁷⁹ and are especially driven to accumulate money and possessions.⁸⁰ This economic motive helps to explain the tremendous geographical expansion of criminal street gangs.⁸¹

78. The gangs studied by Jankowski displayed what he called a "defiant individualist" character, which includes the attributes mentioned above. JANKOWSKI, *supra* note 46, at 23-26. Most of these traits are directly attributable to the realities of life in the inner cities. For example, scarcity of resources leads to gang members' competitiveness, self-reliance, and, above all, the survival instinct. *Id.* at 24-25. Jankowski noted that the defiant air, perhaps the most well-known of gang characteristics, has both a public and private side, and rejects gang research that suggests gang members' tough poses mask their insecurities. *Id.* at 26-27. "[I]n the vast majority of cases, the nut that has a hard shell has a tough kernel too—that is, the individual believes in himself and has strong resolve." *Id.*

79. Despite the conclusions of many gang researchers that gangs are groups of social parasites without the necessary skills or work ethic to be productive in mainstream society, Jankowski found that nearly all the gang members he studied were driven by the spirit of entrepreneurship "which most Americans believe is the core of their productive culture." *Id.* at 101. Jankowski defined entrepreneurial spirit as "the desire to organize and manage business interests toward some end that results in the accumulation of capital" and found that gang members had five characteristics typical of this desire. *Id.* at 101-02. Gang members are highly competitive; they have a strong profit motive; they attempt to gain status through the acquisition of material possessions; they have strong planning abilities; and they are willing and able to undertake risks. *Id.* at 102-05.

80. Gang members "attempt to improve their lives by becoming involved in a business venture, or a series of ventures, that has the potential to create large changes in their own or their family's socioeconomic position." *Id.* at 104. Thus, the gang does not serve a purely social function, but is perceived as a way out of a dismal economic situation. Furthermore, gang members can be quite sophisticated in their economic operations. "[A gang entrepreneur] is likely to pursue a strategy where risk is present, but has been reduced to a moderate level through careful planning: selection of the type of activity, location, strategy for executing the task, protection from being apprehended." *Id.* at 111. As with a successful businessperson, this calculus will also include the various risks involved, the possibilities of failure, and the chances that various mishaps may take place to doom the venture. *Id.* at 111-12.

81. Gangs choose to move out of their established areas for a variety of reasons, mostly economic. Saturation of the market is one such reason. "With a reported gang membership population of 80,000, it is easy to understand why and how competition would reduce crack prices in Los Angeles." Skolnick et al., *supra* note 8, at 203. Out-of-town or out-of-state, by contrast, the market price for drugs is often higher, especially in rural markets with little or no history of drug traffic. *Id.* at 203-04. Big-city drug dealers also can acquire larger quantities of drugs more easily than dealers in smaller areas. *Id.* at 205.

Increased drug activity in a given area often results in a forceful response by the police, providing a powerful incentive for gangs to move on. As one gang member explained, "The law [police] would be death on the neighborhood. They just crack down and come like every other day . . . just make a whole sweep and just take everybody to jail." *Id.* at 203-04. By contrast, gangs may not only outnumber police in smaller cities and towns, but are sophisticated enough to out-think and out-manuever them as well. *Id.* at 205. For a detailed discussion of the geographical extent of gang migration, see *supra* note 8 and accompanying text.

One study concludes that the relationships established in horizontally organized gangs make it easier for these gangs to migrate to other areas. This theory explains why Southern California gangs like the Crips and Bloods "sell drugs from Shreveport, Louisiana to Seattle, Washington" while the vertically

Several different theories have been advanced to explain why people join gangs, or why gangs are started in the first place. One theory posits that gangs are the natural result of people associating with each other; a group will formalize such a relationship as a response to fear and anxiety about their social position.⁸² Another view suggests that young people, particularly minorities, join gangs as a response to the denial of employment or status by society as a whole.⁸³ Others reject these arguments⁸⁴ and suggest instead that factors such as material gain,⁸⁵ recreational or social benefits,⁸⁶ refuge and physical protection,⁸⁷ a desire for rebellion,⁸⁸ and

organized Bay Area gangs do not even travel from San Francisco to Sacramento. *Id.* at 195. It also accounts for the migration of Jamaican and other Caribbean gangs on the east coast, because those gangs tend to be horizontally organized, while the vertically organized New York gangs stay put. *Id.* at 214. According to this view, horizontally organized gangs provide their members with the resources they need to expand out-of-state, including tangible (drugs, money, weapons) and intangible (confidence, courage, attitudes toward risk) support. By contrast, vertically organized gangs create competition within the organization, fostering mistrust and suspicion and forcing members to concentrate on their home turf instead of expanding elsewhere. *Id.* at 210-11, 214-15. For a discussion of different gang organizational structures, see *supra* note 77. This view seems to belie the suggestion that entrepreneurial spirit fosters gang migration, but recall Jankowski's conclusion, *supra* note 79, that virtually all gang members display entrepreneurial characteristics.

82. Under this theory, people join gangs to defend themselves against conflict and to make order out of a chaotic world. JANKOWSKI, *supra* note 46, at 37.

83. *Id.* at 37-38. According to this view, the gang serves as a subculture which compensates for the lack of recognition by the larger society. *Id.* at 38. A related theory suggests that people join gangs because of a lack of self-esteem caused by societal rejection, which the status of gang participation can correct. *Id.*

84. Jankowski is one of them. He also rejects several other common theories of gang involvement, including gang participation as a result of a broken home; the lack of a male authority figure or a strong family unit; that younger children join because they idolize older gang members; or that a lack of education and poor job opportunities leaves people with nothing better to do. *Id.* at 39-40. His theories on gang involvement are discussed *infra* at notes 85-89.

85. This motivation can take many forms. Some may join gangs because the gang provides a more dependable source of income, even though the individual might have been able to gain more per "economic venture" (as Jankowski puts it) had they acted alone. JANKOWSKI, *supra* note 46, at 40. The gang also can reduce the amount of individual effort required to gain money and lessen the risk of injury resulting from one's "economic ventures." *Id.* at 41. For others, the gang can become "the combination of a bank and a social security system, the equivalent of what the political machine had been to many new immigrant groups in American cities." *Id.* (citation omitted). The gang provides psychological and financial security for members and their families. *Id.*

86. *Id.* at 42-43. In this regard, Jankowski compares gangs to college fraternities, or fraternal lodges such as the Elks. "Many individuals said they joined the gang because it was the primary social institution of their neighborhood . . ." *Id.* at 42-43.

87. *Id.* at 44-45.

88. This desire may stem in particular from gang members' rejection of their parents' lifestyle, because most of their parents tend to be either underemployed or work in low-paying, low-status jobs. *Id.* at 45. "Deciding to become a gang member is both a statement to society ('I will not take these jobs

a sense of commitment to one's community⁸⁹ are the primary motivations for gang membership.

Recruiting strategies vary from gang to gang, and may vary within individual gangs according to their particular needs. Most use one of three recruiting styles. Prospective members may be coerced (physically or psychologically) into joining;⁹⁰ they may be "sold" on the gang and its social benefits;⁹¹ or gang membership may be portrayed as a community obligation.⁹² These recruiting attempts start early, sometimes when potential members are only in grade school.⁹³ Gangs often require prospective members to prove their fighting ability, usually by fighting a current member of the gang.⁹⁴

passively") and an attempt to do whatever can be done to avoid such an outcome." *Id.* at 45.

89. This is most true of communities in which gangs have existed for several generations, such as Hispanic communities in Los Angeles. *Id.* at 46; *see supra* note 68 and accompanying text. "Many of these individuals have known people who have been in gangs, including family members . . . They feel that their families and their community expect them to join, because community members see the gang as an aid to them and the individual who joins as meeting his neighborhood obligation." *Id.* at 46.

90. This occurs most often when gangs decide to expand into other geographic areas. JANKOWSKI, *supra* note 46, at 55. They will recruit new members both from the original base area, in order to establish numerical superiority over rival gangs in the new area, and from the new area in order to gain control over the territory. This method is also used defensively, as when rival gangs threaten a gang's home territory, and by gang members who split off to form their own group. *Id.* at 55-57. Coercion can be psychological (threatening the recruit or the recruit's family with physical harm) or physical (inflicting pain on the recruit or a family member, or destroying property). *Id.* at 58-59. The latter is usually discouraged because it can create resentment among the recruits. *Id.* at 59.

91. Jankowski calls this the "fraternity type of recruitment," in which "the gang adopts the posture of an organization that is 'cool,' 'hip,' the social thing to be in." *Id.* at 48. After advertising by word of mouth that the gang is seeking new members, the gang will usually hold a meeting or a party at which the sales pitch is delivered. This pitch highlights the gang's activities and social benefits, including the availability of drugs, women, and money. *Id.*

92. This technique plays on the role of the gang in the community and the respect afforded its members. "In essence, the gang recruiter's pitch is that everyone who lives in this particular community has to give something back to it in order to indicate both appreciation of and solidarity with the community." *Id.* at 52. Again, this is most common and most effective in areas where gangs have been around for a long period of time. *Id.* at 55.

93. *See Morganthau, supra* note 7, at 23. "[G]ang veterans call their young acolytes 'peewees' or 'wannabes.'" *Id.*

94. Although some suggest that fighting ability is a form of status both inside and outside the gang, others see a more practical consideration. "Members of gangs want to know if a potential member can fight because if any of them are caught in a situation where they are required to fight, they want to feel confident that everyone can carry his or her own responsibility." JANKOWSKI, *supra* note 46, at 49. The practice of fighting one's way into a Hispanic gang is known as "courting in," or "jumping in," and gang members may similarly have to fight their way out of the gang if they want to leave. COVEY ET AL., *supra* note 9, at 61-62, 192.

A gang in Marion, Indiana, known as the "G's," required that "[a]nyone wanting to be a member . . . had to be willing to fight." *Jackson v. State*, 634 N.E.2d 532, 533 (Ind. Ct. App. 1994). New

Violence is a prominent activity among gangs,⁹⁵ and indeed has contributed greatly to their increased visibility.⁹⁶ Nearly twenty years ago, one gang researcher asserted that “[t]he amount of lethal violence currently directed by youth gangs in major cities both against one another and against the general public is without precedent.”⁹⁷ This observation may be even more true now than it was then.⁹⁸ Gang violence is often related to drug activity,⁹⁹ but also exists independent of the drug trade.¹⁰⁰ Gang violence is often committed at random.¹⁰¹ By the mid-1970s, gangs were using a sophisticated array of weapons,¹⁰² and they have continued to

members were “blessed” into the gang either by being branded on the chest or being “jumped.” “Being ‘jumped’ meant having other ‘G’s’ beat up the new member.” *Id.* The court in *Helton v. State*, 624 N.E.2d 499 (Ind. Ct. App. 1993), described an initiation ritual performed by another Indiana gang, the Imperial Gangster Disciples. In the ritual, called a “46,” gang members stood in a circle around an ironing board with a blue bandanna, a candle and a handgun resting on top. The members hit the initiate in the head forty times and in the chest six times. *Id.* at 504.

95. “There is substantial evidence that young men involved in gangs are likely to be more violent than offenders of the same age acting alone or with others outside a gang context . . .” SEARCHING FOR ANSWERS, *supra* note 6, at 75.

96. Between 1985 and 1989, per capita gang homicides in America increased ten percent. *Id.* (citation omitted). Possible explanations for the rise in gang violence include the use of increasingly lethal weapons by gangs. *Id.* Demographic factors, such as the increasing numbers of gangs across the country and the aging of gang members (who are more likely to commit homicides as they grow older), may also play a role. *Id.* Police have also changed their reporting practices in an effort to track gang-related activity, and this may also account for the perceived increase in gang violence. *Id.*

97. COVEY ET AL., *supra* note 9, at 27 (citation omitted).

98. See, e.g., *supra* notes 5, 96 and accompanying text; *infra* notes 101, 111-12 and accompanying text.

99. “Given the high profits of illegal drug sales, it is easy to understand why the competition for drug markets and control of these markets has led some gangs to open gang warfare reminiscent of the Prohibition era.” COVEY ET AL., *supra* note 9, at 41-42. A late 1980s study of 179 murders in New York determined that 56% involved drugs. Of these, most stemmed from business disputes in the drug trade, from protecting turf to intimidating the competition. Larry Martz, *A Tide of Drug Killing*, NEWSWEEK, Jan. 16, 1989, at 45.

100. One study suggests that violence among Hispanic gangs in East Los Angeles is attributable to rivalries between gangs that are unrelated to drug dealing. SEARCHING FOR ANSWERS, *supra* note 6, at 75

101. In just one of numerous examples of random gang violence, five people in Omaha were killed during a six-day period in 1990. “The shootings were indiscriminate, and there is evidence that they were undertaken for no more than meeting one expectation associated with dangerous gangs: go out and find someone to hurt, even kill, if necessary and feasible.” COVEY ET AL., *supra* note 9, at 27. “In the callous lingo of the drug trade, [bystanders caught in the crossfire] are shrugged off as ‘mushrooms’ . . .” Martz, *supra* note 99, at 44.

102. One gang researcher of the period, detailing the types of weapons confiscated from gangs by police, found that gangs used rifles, shotguns and handguns of all calibers; semi-automatic rifles, which were often converted to automatics; homemade mortars; Molotov cocktails; and pipe bombs. COVEY ET AL., *supra* note 9, at 29.

keep pace with weapons technology.¹⁰³

Gangs have become solidly established within the culture of the inner city; gang members are revered for their social status¹⁰⁴ and for the trappings of their ill-gotten wealth.¹⁰⁵ This is particularly true in those areas in which gangs have existed for several generations, creating family ties to a particular gang and a sense of community responsibility.¹⁰⁶ The gang often acts as a surrogate family for its members, many of whom grew

103. "With millions of dollars rolling in, [gangs] threw away their Saturday-night specials and began buying bulletproof vests, silencers and sophisticated weapons—military assault guns, machine guns and fully automatic pistols." Martz, *supra* note 99, at 44. Major gangs now have weapons superiority over most police forces. In fact, this is one area in which the comparison between the current drug gangs and the Mafia during Prohibition, *see supra* note 10, tends to break down, because the gangs are far better armed and far more violent than the Mafia. Morgenthau, *supra* note 7, at 22. The gangs' interest in greater firepower is driven by the competition over drug markets, as well as the status that the sophisticated weapons provide. *See* Stephen Braun & Craig Quintana, *Teen Gangs Measuring 'Bad' by Size of Firepower*, L.A. TIMES, Aug. 16, 1987, at 1 (Metro). According to a Los Angeles Youth Gang Services Project Assistant Director: "There is a standard that has crept into the game that the bigger your guns get, the badder you are." *Id.*

104. Some experts have argued that concentrated anti-gang sweeps, quite apart from their constitutional problems, may backfire on police because they increase the prestige of the gang within the community. If police round up gang members but then impose little or no sanctions, the gang members return to their neighborhoods and brag about beating the system. *See* T.W. McGarry & Steve Padilla, *Experts Warn Gang Sweeps May Have a Negative Effect*, L.A. TIMES, Apr. 24, 1988, at 1, 2 (Metro). "The last thing you want to do . . . is to increase their sense of identification and solidarity, reinforce their special [tough] nature," said one researcher. *Id.* (alteration in original).

105. Like other forms of criminal activity, gang-related crime is often viewed as a route out of poverty. "For many gang members, the intrigue, fighting and shooting associated with gang life . . . are like a game. The prizes—obscene amounts of money, status, excitement—are almost irresistible to growing numbers of youths from poor, troubled families." Mari McQueen, *For Kids, Death's Part of the Game, Money's the Prize*, SACRAMENTO BEE, June 27, 1988, at A1.

A 1988 *Time* magazine article described a young gang member called Frog. "Frog is a cocky prince of the barrio. His mane of lustrous jeri curls, his freckled nose and innocent brown eyes belie his prodigious street smarts." Frog proudly reports that he makes \$200 a week selling crack, and boasts of renting a sports car with drug profits. "He has not yet learned how to use a stick shift, however, and at 4 ft. 10 in., he sometimes has trouble seeing over the dashboard. Frog is 13 years old." Jacob Lamar, *Kids Who Sell Crack*, TIME, May 9, 1988, at 20. According to a Los Angeles police officer, a 21-year-old gang member known as "Way Out" owned four cars: a Rolls Royce, a Corvette, a BMW and a Mercedes-Benz. Dean Murphy, *L.A. Black Gangs Likened to Organized Crime Groups*, L.A. TIMES, Jan. 11, 1987, at 1, 23. He paid cash for all of them except the Rolls Royce, for which he made a \$30,000 down payment and didn't miss a single \$2,400 monthly payment. *Id.* Frequently, gang members share the proceeds from illegal activity with their families. "When they don't bring the money [home], they get in trouble with their mothers." *Id.* For a more detailed discussion of monetary incentives to join gangs, *see supra* notes 80, 85 and accompanying text.

106. *See supra* note 92 and accompanying text.

up without a strong family unit.¹⁰⁷ As in the 1950s,¹⁰⁸ the gang is again part of the popular culture—portrayed much more accurately this time.¹⁰⁹ This popular image adds to the mystique of the gang in the inner city and elsewhere.¹¹⁰

107. Léon Bing, who spent four years studying the Crips and Bloods in Los Angeles, observed that this sense of family creates a strong sense of allegiance to the gang. "Their lives are so desolate, they have so little hope, . . . [t]hey have nothing you would recognize as family life . . . They claim their 'hood'—pledge allegiance to their neighborhood gang—and it becomes their whole world, their family. Their loyalty is fierce." Janice Castro, *In the Brutal World of L.A.'s Toughest Gangs*, TIME, Mar. 16, 1992, at 12 (quoting Léon Bing). Gangs provide inner-city youths with stability and status sorely lacking in their lives. "[Gang participation] gives them a sense of belonging, filling a need that has not been met in their lives, for self-esteem, acceptance . . . If a kid doesn't feel like anything at home, he can go out on the street and play 'crazy Jake.' It gives him a sense of worth. It's a surrogate family." Karen Laing, *Gangs Need an Alternative to Crime*, CHRISTIAN SCI. MONITOR, Nov. 19, 1986, at 26; see also *supra* note 25 and accompanying text.

108. See *supra* note 50 and accompanying text.

109. The 1991 movie *New Jack City*, according to one review, portrayed gang members as "a new breed of super-Yuppie criminals. . . . [They are] natty gangster[s] . . . with flashy sculptured hair, advanced computer systems, cellular phones and high-tech weapons . . . Crack is their junk-bond capital, a new source of seemingly unlimited—and carelessly destructive—power." John Leland, *Night of the Living Crackheads*, NEWSWEEK, Mar. 25, 1991, at 52. This is a glorified depiction of gang life, to be sure, but is more faithful to its subject than its 1950s predecessors. This portrayal, at least, was accurate enough that riots, fights and shootings broke out at showings of the movie across the country. Priscilla Painton, *When Life Imitates Art: A Hot New Gang Movie Sparks Widespread Violence*, TIME, Mar. 25, 1991, at 19.

110. The most prominent example of gang influence in current popular culture is "gangsta rap" music. It is condemned for "its comic-book Afrocentrism, its monotonous profanity, its Uzi-brandishing, its anti-Semitism and intolerance of Asians, its homophobia and crotch-grabbing misogyny, and the seeming determination of many of its performers to conform to every negative black stereotype," but is also currently the most popular style of rap music. Francis Davis, *Vox Populi*, THE ATLANTIC, Oct. 1993, at 106. Its popularity extends across racial lines. David Samuels, *The Rap on Rap: The "Black Music" that Isn't Either*, THE NEW REPUBLIC, Nov. 11, 1991, at 24. "Rap's appeal to whites rest[s] in its evocation of an age-old image of blackness: a foreign, sexually charged, and criminal underworld against which the norms of white society are defined, and, by extension, through which they may be defied." *Id.* at 25.

In the inner cities, gangsta rappers also have considerable status. Despite being indicted for murder in November 1993, rapper Snoop Doggy Dogg (*né* Calvin Broadus) still is regarded as a role model by black youths. John Leland, *Criminal Records: Gangsta Rap and the Culture of Violence*, NEWSWEEK, Nov. 29, 1993. "[T]he allegations have done nothing to shake Snoop's status as a local hero [in Long Beach, California, where Broadus grew up]," said one report. "For the kids . . . Snoop's music registers as an accurate depiction of their lives as well as his own." *Id.* at 63.

B. California's STEP Act and Other State Anti-Gang Laws

1. The STEP Act

The dramatic escalation of gang violence in California¹¹¹—and its increasing toll on innocent citizens caught in the crossfire¹¹²—led to the perception that gang activity had reached crisis proportions¹¹³ and prompted legislative action. In 1987, legislation that would become the STEP Act was introduced in the California legislature.¹¹⁴ The measure provided a three-pronged approach to deter criminal street gangs: criminal prosecution, civil action and asset forfeiture.¹¹⁵ The Act was based on the premise that existing laws punished only the manifestation of the gang problem, criminal activity, and not the problem itself, the pervasive presence of highly disciplined criminal organizations.¹¹⁶

111. Gang-related homicides in Los Angeles increased by 24% between 1985 and 1986. Hull, *supra* note 57, at 21. By the time California's anti-gang law was pending in the legislature in mid-1987, there had already been 200 gang killings in Los Angeles County that year, a projected increase of 80% over the 1986 total of 325 gang-related homicides. Jerry Gillam, *Anti-Gang Bill Wins Backing of Senate Panel*, L.A. TIMES, June 10, 1987, at 3, 21.

112. In 1987, Los Angeles police estimated, a majority of the city's nearly 200 gang-related homicides involved bystanders, robbery victims or other nongang members. Paul Feldman, "Murder by Strangers"; *From Gang Gunfire to Freeway Shootings, L.A. County's 1987 Homicides Often Linked by Their Random Nature*, L.A. TIMES, Dec. 30, 1987, at 1, 8 (Metro). One 9-year-old was playing in a sandbox in south central Los Angeles when crossfire between two rival gangs caught him in the neck. He was dead within an hour. *Id.* at 1. A 66-year-old woman, who worked as a housemother for abused children, was killed in her Compton home when a stray bullet from a gang shootout hit her in the back while she sat at her desk. *Id.* "One of the things bothering us," said an Inglewood, California, police officer, "is the people firing the bullets have no regard for where they will end up." *Id.* at 8.

113. At a news conference to announce his endorsement of the STEP Act legislation, Los Angeles District Attorney Ira Reiner said that street gangs in L.A. "pose an imminent threat to the safety of the citizens of Los Angeles and California." Harris, *supra* note 13, at *1. The legislative findings accompanying the STEP Act declared that "the state of California is in a state of crisis which has been caused by violent street gangs whose members threaten, terrorize and commit a multitude of crimes against the peaceful citizens of their neighborhoods." CAL. PENAL CODE § 186.21 (West 1994). These activities, the legislature found, were a clear and present danger to public safety and, significantly, were not constitutionally protected. *Id.*

114. The measure was introduced in the California Senate by Senator Alan Robbins, a Democrat from Van Nuys, and in the Assembly by Assemblywoman Gwen Moore, a Democrat from Los Angeles. Gillam, *supra* note 111, at 3, 13, 21.

115. Harris, *supra* note 13, at *1. The anti-gang legislation made it a criminal act to participate in a street gang and contained sentence enhancements for gang-related crimes. It also provided for private civil actions for injunctive relief and allowed gang members' property to be seized in forfeiture actions. *Id.*

116. "[N]owhere in current California law do we recognize the unique danger posed by criminal organizations whose primary purpose is to commit serious and violent crime," said District Attorney

However, the measure did not survive the legislative process intact. The Senate Public Safety Committee did not approve the bill until its Senate sponsor, Senator Alan Robbins, agreed to drop criminal forfeiture provisions that would have required the seizure of gang members' property if it was acquired through criminal gang activity.¹¹⁷ Committee members were concerned that relatives of gang members would be affected by the proposed forfeitures although they were not involved in gang or other criminal activities.¹¹⁸

The legislation also met with opposition from the American Civil Liberties Union on freedom of association grounds,¹¹⁹ and from others who argued that the legislation was drawn too broadly.¹²⁰ Nevertheless, it passed the legislature¹²¹ and was signed into law on September 24, 1988 by Governor George Deukmejian.¹²²

The STEP Act establishes the new crime of participation in a criminal street gang, punishable by up to one year in a county jail or one to three years in state prison.¹²³ It also provides sentence enhancements of one to three years for gang-related felony cases. The court must impose the middle

Ira Reiner. "I believe that California law should explicitly make participation in such a gang a crime." *Id.*

117. Gillam, *supra* note 20, at 16.

118. *Id.* Robbins said the amended legislation did "not go as far as we would like . . . in dealing with the cancer of gangs We need to get that [forfeiture of assets] at some point." *Id.*

To its credit, the California legislature did amend the state's drug forfeiture law in 1988 to enhance the state's ability to seize the assets of drug dealers. The amendment lowered the burden of proof required to show that the property is tied to drug sales from a clear and convincing evidence standard to a preponderance of the evidence standard. It also allowed local police to keep a greater share of the proceeds from the sale of seized property. Stephanie O'Neill, *Law Makes It Easier to Seize Drug Assets in State Courts*, L.A. TIMES, Oct. 27, 1988, at 11; see CAL. HEALTH & SAFETY CODE § 11470.1 (West Supp 1994).

119. See Harris, *supra* note 13, at *1.

120. "This bill could have justified the internment of the Japanese in World War II," said Senator Bill Lockyer, a democrat from Hayward, perhaps taking exception to the assertions of a "gang crisis" in Los Angeles and elsewhere in California. The Senator further commented, "If that feels good to you, vote for it." Gillam, *supra* note 111, at 3, 21.

121. Carl Ingram & Jerry Gillam, *Some Win, Some Lose in Rush to Adjourn*, L.A. TIMES, Sept. 2, 1988, at 3.

122. Jerry Gillam & Daniel M. Weintraub, *Governor Signs Curbs on Gangs, Drugs*, L.A. TIMES, Sept. 25, 1988, at 29.

123. Section 186.22(a) of the California Penal Code provides:

Any person who actively participates in any criminal street gang with knowledge that its members engage 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, shall be punished by imprisonment in a county jail for a period not to exceed one year, or by imprisonment in the state prison for one, two, or three years.

CAL. PENAL CODE § 186.22(a) (West Supp. 1994).

portion of the sentence enhancement (two years) unless there are mitigating or aggravating circumstances, and must explain its choice of sentence enhancements on the record.¹²⁴ A 1991 amendment to the STEP Act increased the possible sentence enhancements to two to four years for felonies committed within one thousand feet of a school during school hours.¹²⁵

STEP also covers gang-related misdemeanors, establishing a minimum sentence of up to one year in a county jail and a maximum of one to three years in state prison.¹²⁶ Those sentenced to county jails serve at least 180 days before being released.¹²⁷ As with felonies, courts may reject the sentence enhancements in the interests of justice, but in such "unusual cases" the court must explain on the record its reasons for doing so.¹²⁸

To violate the STEP Act, a person must actively participate in a criminal street gang with knowledge that its members engage in a pattern of criminal gang activity.¹²⁹ The STEP Act defines a "pattern of criminal gang activity" as the commission, attempted commission, or solicitation of two or more predicate offenses within three years, as long as the offenses are committed on separate occasions or by two or more people.¹³⁰ A

124. Section 186.22(b)(1) provides in relevant part:

[A]ny person who is convicted of a felony which is committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished by an additional term of one, two, or three years at the court's discretion. The court shall order the imposition of the middle term . . . unless there are circumstances in aggravation or mitigation. The court shall state the reasons for its choice of sentence enhancements on the record at the time of the sentencing.

CAL. PENAL CODE § 186.22(b)(1) (West Supp. 1994). Defendants have argued, unsuccessfully, that sentence enhancement proceedings under this section should be bifurcated from trial on the underlying felonies. *See* *People v. Fines*, 28 Cal. Rptr. 2d 758, 764-65 (Ct. App. 1994); *People v. Martin*, 28 Cal. Rptr. 2d 660, 662-63 (Ct. App. 1994).

Section 186.22(b)(2) requires that those convicted of gang-related felonies punishable by life in prison not be paroled before serving at least 15 calendar years of their sentence. *Id.* § 186.22(b)(2). Furthermore, a 1994 amendment to the STEP Act requires 180 days of jail time whenever probation is granted or sentence suspended either on a substantive gang participation conviction or a gang-related felony with sentence enhancement. *Id.* § 186.22(c).

125. CAL. PENAL CODE § 186.22(b)(1) (West Supp. 1994).

126. *Id.*

127. *Id.* § 186.22(c).

128. *Id.* § 186.22(d).

129. *Id.* § 186.22(a).

130. *Id.* § 186.22(e). The predicate offenses listed in the Act are: assault with a deadly weapon; robbery; unlawful homicide or manslaughter; selling, possessing for sale, transporting, manufacturing, offering for sale or offering to manufacture controlled substances; shooting at an inhabited dwelling or

“criminal street gang” is defined as an organization or association, formal or informal, of three people or more, which has a common name, sign or symbol. The gang’s primary activities must include the commission of one or more predicate acts, and its members, individually or collectively, must be involved in a pattern of criminal gang activity.¹³¹

Thus, a conviction for criminal street gang participation under the STEP Act requires proof of five major elements: 1) the existence of a criminal street gang (which requires a showing that the commission of one or more predicate acts is one of the gang’s primary activities and that its members are engaged in a pattern of gang activity); 2) defendant’s membership in that gang; 3) defendant’s knowledge that the gang members are engaged in a pattern of gang activity; 4) defendant’s willful promotion, furtherance or assistance in felonious criminal conduct by the gang; and 5) the pattern of gang activity itself, that is, the commission of two or more predicate crimes within three years.

The STEP Act also contains nuisance and weapon forfeiture provisions. Buildings used by gang members for the commission of STEP Act predicate crimes¹³² or any other offenses involving deadly weapons, burglary or rape may be declared public or private nuisances.¹³³ Additionally, gang weapons owned or possessed for the commission of STEP Act predicate crimes, burglary or rape may be seized and not returned if they are declared a nuisance.¹³⁴ Amendments to the STEP Act punish those who “utilize[] physical violence” to induce others to join criminal street

occupied motor vehicle; arson; intimidation of witnesses or victims; and grand theft of a vehicle, trailer or vessel. *Id.* § 186.22(e)(1)-(8). All the predicate offenses are punishable crimes under the California Penal Code.

131. Section 186.22(f) provides:

As used in this chapter, “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 one or more of the criminal acts enumerated in [subsection (e)], which has a common name or common identifying sign or symbol, whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.

CAL. PENAL CODE § 186.22(f) (West Supp. 1994).

132. *See supra* note 130.

133. CAL. PENAL CODE § 186.22a(a) (West Supp. 1994). The nuisance sections of the STEP Act incorporate by reference the provisions of California nuisance law, codified in the Health and Safety Code. These laws allow district attorneys, city attorneys, or private citizens to bring suit to abate public nuisances. *See* CAL. HEALTH & SAFETY CODE § 11571 (West 1991 & Supp. 1994). The nuisance portion of the STEP Act does reserve several exceptions to the general nuisance law, most notably that no civil penalty will be assessed unless the person to be penalized knew or should have known of the unlawful acts taking place within the building. CAL. PENAL CODE § 186.22a(b)(1) (West Supp. 1994).

134. CAL. PENAL CODE §§ 186.22a(e)(1), (e)(2) (West Supp. 1994).

gangs¹³⁵ and those who supply or sell firearms with knowledge that the buyer or transferee will use the weapons to commit a gang-related felony.¹³⁶ A separate provision of the California Penal Code establishes enhanced sentences for defendants who carry firearms during the commission of any STEP Act predicate crime.¹³⁷

2. Other State Anti-Gang Laws

Since California enacted its landmark STEP Act in 1988, twelve other states have followed with their own statutory responses to criminal street gangs.¹³⁸ Many of these statutes are based at least in part on the California law. Louisiana,¹³⁹ Georgia¹⁴⁰ and Missouri¹⁴¹ have enacted anti-gang laws that are essentially identical to the California STEP Act. Other states have employed approaches similar to California's,¹⁴² and still others have added new gang-specific provisions to existing laws.¹⁴³

135. A 1993 amendment punishes the threat of physical violence by adults in the solicitation of minors to participate in criminal street gangs. *Id.* § 186.26. Minors who threaten or use such coercion are guilty of a misdemeanor. *Id.* § 186.26(c). These provisions were part of the original STEP Act legislation, but were dropped during the legislative process and were not returned until 1993. *Id.* (historical and statutory notes).

136. *Id.* § 186.28. This offense is punishable by up to one year in prison or a county jail, and/or a fine of up to \$1,000. The buyer or transferee must first be convicted of one of the STEP predicate crimes in order for a seller to be prosecuted under this provision. This provision does not apply to sellers who themselves are convicted as principals of a STEP predicate felony. This crime was established in a 1992 amendment to the STEP Act. *Id.*

137. The sentence enhancements apply to any person who carries a firearm, loaded or unloaded, on their person or in a vehicle during the commission or attempted commission of gang-related crimes under sections 186.22(a) and (b) of the STEP Act. *Id.* § 12021.5. Enhanced sentences could thus be imposed either for the commission of a predicate crime that establishes a pattern of criminal street gang activity (§ 186.22(a)) or for a felony committed for the benefit of the gang (§ 186.22(b)). *See supra* notes 123-24 and accompanying text.

138. *See supra* note 27 and accompanying text.

139. LA. REV. STAT. ANN. §§ 15.1403-1405 (West 1992).

140. GA. CODE ANN. §§ 16-15-3 to -5 (1992). Georgia's anti-gang law does not, however, contain nuisance or weapon forfeiture provisions such as those found in section 186.22a of the California STEP Act.

141. MO. ANN. STAT. §§ 578.421-430 (Vernon Supp. 1994).

142. *See, e.g.*, IOWA CODE ANN. § 723A.2 (West Supp. 1993); MINN. STAT. ANN. § 609.229 (West Supp. 1995).

143. Oklahoma supplemented an existing statute, which prohibits contributing to the delinquency of minors, by providing penalties for those who encourage or recruit minors to join street gangs. Under this law, gangs are defined as a group of five or more people that not only participates in the commission of one or more predicate acts, but that requires the commission of a predicate crime as a membership condition. OKLA. STAT. ANN. tit. 21, §§ 856D-F (West Supp. 1995). Nevada added sentence enhancements for gang-related felonies. NEV. REV. STAT. § 193.168 (Michie Supp. 1993).

Nevada's gang law is noteworthy because it specifically allows expert testimony to be admitted to

The anti-gang statutes of Florida, Illinois and South Dakota represent the most substantial departures from the California model. Florida's Street Terrorism Enforcement and Prevention Act, passed in 1990, has a specific definition of "criminal street gang member"¹⁴⁴ and a broader definition of "pattern of criminal street gang activity."¹⁴⁵ It does not establish a substantive gang-participation crime, although it does create sentence enhancements for gang-related felonies.¹⁴⁶ South Dakota employs an almost identical approach.¹⁴⁷ Illinois provides a civil cause of action in favor of any public authority affected by gang activity¹⁴⁸ and sentence enhancements for gang-related felonies.¹⁴⁹ Illinois also uses a different

show gang characteristics, rivalries, common practices and operations, social customs and behavior, terminology used by gang members, codes of conduct, and the types of crimes commonly committed by gangs. *Id.* § 193.168.5 (1993).

144. Section 874.03(2) defines "criminal street gang member" as a person who engages in a pattern of criminal street gang activity and meets two or more of the following criteria:

- (a) Admits to criminal street gang membership.
- (b) Is a youth under the age of 21 years who is identified as a criminal street gang member by a parent or guardian.
- (c) Is identified as a criminal street gang member by a documented reliable informant.
- (d) Resides in or frequents a particular criminal street gang's area and adopts their style of dress, their use of hand signs, or their tattoos, and associates with known criminal street gang members.
- (e) Is identified as a criminal street gang member by an informant of previously untested reliability and such identification is corroborated by independent information.
- (f) Has been arrested more than once in the company of identified criminal street gang members for offenses which are consistent with usual criminal street gang activity.
- (g) Is identified as a criminal street gang member by physical evidence such as photographs or other documentation.
- (h) Has been stopped in the company of known criminal street gang members four or more times.

FLA. STAT. ANN. § 874.03(2) (West 1994).

145. Instead of providing a list of predicate offenses, the Florida law defines a pattern of criminal street gang activity as the commission, attempted commission, or solicitation of two or more separate felonies or violent misdemeanors within a three-year period. *Id.* § 874.03(3).

146. *See id.* § 874.04.

147. S.D. CODIFIED LAWS ANN. §§ 22-10-14 to -15 (Supp. 1994). The only difference between the two states' laws is that South Dakota omits item (b) from the list of gang member criteria contained in the Florida law. *See id.* § 22-10-14(2); *supra* note 145 (text of Florida's statutory definition of gang member).

148. Illinois enacted the Streetgang Terrorism Omnibus Prevention Act in 1993 (the STOP Act), providing a civil remedy for those public authorities affected by street gang activity. ILL. ANN. STAT. ch. 740, para. 147/15 (Smith-Hurd Supp. 1994). Indiana also provides a civil cause of action for victims of criminal gang activity. *See* IND. CODE ANN. §§ 34-4-30.5-1 to -3 (Burns Supp. 1994).

149. The STOP Act also amended the Illinois criminal disposition laws by adding sentence enhancements for gang-related forcible felonies and for criminal street gang activity committed on school property or a school bus. The definition of criminal street gang under the new legislation replaced a statutory definition of "organized gang" in a 1986 provision preventing probation for gang-

statutory definition of "gang" than California's STEP Act.¹⁵⁰ Other state laws also reject the California model, but the laws of Florida, South Dakota and Illinois raise particular constitutional concerns.¹⁵¹

III. CONSTITUTIONAL AND PRACTICAL PROBLEMS WITH STATE ANTI-GANG LAWS

A variety of constitutional challenges and practical concerns have been raised with respect to state anti-gang statutes, particularly the California STEP Act and statutes modeled on it. Thus far, the laws have survived constitutional attack,¹⁵² but the winning streak may not continue. At a minimum, the various challenges to anti-gang laws suggest that these statutes should be refined. In addition, several state anti-gang laws that reject the California model raise serious constitutional questions, even though those statutes have not yet been challenged in court.

A. Constitutional Problems

In California, the primary constitutional challenges to the STEP Act have been based on vagueness, overbreadth, or both. A statute can be held void for vagueness if it does not provide adequate notice of the conduct it seeks

related felonies. Compare ILL. ANN. STAT. ch. 740, para. 147/10 (Smith-Hurd Supp. 1994) with ILL. ANN. STAT. para 5/5-5-3(c)(2)(J) (Smith-Hurd 1992).

150. "Streetgang" is defined as "any combination, confederation, alliance, network, conspiracy, understanding, or other similar conjoining . . . of 3 or more persons with an established hierarchy that, through its membership or through the agency of any member engages in a course or pattern of criminal activity." *Id.* ch. 740, para. 147/10 (Smith-Hurd Supp. 1994). A course or pattern of criminal activity is defined as two or more gang-related crimes (at least one of which is a felony) committed within 5 years of each other. Gang-related crimes under the statute are those committed to increase the membership, dominance or control of the gang; to provide the gang with an advantage in a criminal market sector; to exact revenge or retribution for the gang or a gang member; to obstruct justice or intimidate or eliminate any witness against the gang or any member of the gang; or for the general benefit of the gang, its members or its reputation. *Id.* Gang members include "any person who actually and in fact belongs to a gang, and any person who knowingly acts in the capacity of an agent for or accessory to, or is legally accountable for, or voluntarily associates himself with a course or pattern of gang-related criminal activity . . . or who knowingly performs, aids, or abets any such activity." *Id.*

151. While the California STEP Act mirrors the federal RICO statute, Arkansas' Criminal Gang, Organization or Enterprise Act is modeled on the federal Continuing Criminal Enterprise statute. See ARK. CODE ANN. § 5-74-104 (Michie Supp. 1993). The federal CCE statute is codified at 21 U.S.C. § 848 (1988). See *supra* note 23.

Indiana's anti-gang act defines "criminal gang" as a group of five or more people which either promotes or participates in the commission of a felony and requires the commission of a felony as a condition of membership. Participation in a gang is a substantive crime under the Indiana law. IND. CODE ANN. §§ 35-45-9-1 to -4 (Burns Supp. 1994).

152. See *supra* notes 33-36 and accompanying text.

to proscribe. This rule is designed to prevent arbitrary or discriminatory enforcement.¹⁵³ A law also may be struck down if it is drawn too broadly and, as a result, its regulation of conduct violates constitutionally protected rights.¹⁵⁴

The California Court of Appeal first confronted a vagueness and overbreadth challenge to the STEP Act in *People v. Green*.¹⁵⁵ In *Green*, the defendant contended that the terms "actively participates"¹⁵⁶ and "members"¹⁵⁷ were so uncertain as to be unconstitutionally vague.¹⁵⁸ The defendant also claimed that "member" was broad enough to include people who had been coerced into joining a gang, and thus the statute was void for overbreadth.¹⁵⁹ Nonetheless, the court rejected both the vagueness and overbreadth challenges and upheld the defendant's guilty plea to a violation of the STEP Act.¹⁶⁰

The court noted that in order for statutory provisions to survive a vagueness challenge, they need not be defined precisely, but will be upheld if they may be made reasonably certain by the plain language of the statute or by reference to common understanding.¹⁶¹ The court held that "member" had both a well-defined common meaning and a judicial definition, the latter of which refers to a person's relationship to an organization that is not accidental or artificial.¹⁶² The court then looked to the common-law definition of "active membership" to define "active participation" and found that "[t]o be convicted of being an active participant in a street gang, a defendant must have a relationship with a criminal street gang which is (1) more than nominal, passive, inactive or purely technical; and (2) the person must devote all, or a substantial part of his time and efforts to the criminal street gang."¹⁶³ Thus, because the terms member and actively participates had well-established definitions, the Act was not void for vagueness.¹⁶⁴ The court also rejected out of hand the defendant's overbreadth argument,

153. See *People v. Gamez*, 286 Cal. Rptr. 894, 902 (Ct. App. 1991) (citing *People v. Superior Court*, 758 P.2d 1046 (Cal. 1988)).

154. See *NAACP v. Alabama*, 377 U.S. 288, 307 (1964).

155. 278 Cal. Rptr. 140 (Ct. App. 1991).

156. CAL. PENAL CODE § 186.22(a) (West Supp. 1994).

157. *Id.*

158. 278 Cal. Rptr. at 142, 144-46.

159. *Id.* at 146.

160. *Id.* at 148.

161. *Id.* at 145.

162. *Id.* (citing *Galvan v. Press*, 347 U.S. 522, 528 (1954)).

163. *Green*, 278 Cal. Rptr. at 146.

164. *Id.* at 145-46.

noting that the statute does not punish mere membership, but the promotion, furtherance or assistance of criminal conduct by a member of the gang.¹⁶⁵

The next constitutional challenge to the STEP Act on grounds of vagueness and overbreadth came in *People v. Gamez*.¹⁶⁶ In *Gamez*, the defendant claimed that the term “criminal street gang” was vague and overly broad. Gamez argued that the statute could be used to punish membership in groups such as the Los Angeles Police Department (LAPD) or even an organization of environmental activists, so long as individual members of the group commit criminal offenses.¹⁶⁷ In rejecting the overbreadth challenge, the court noted that even if LAPD officers commit crimes while on duty, the statute only punishes those groups who commit crimes as one of their primary activities, a category into which neither the LAPD nor environmental activist groups fall.¹⁶⁸ Because the STEP Act does not regulate speech or association, but conduct—and then only criminal conduct—it is not overly broad.¹⁶⁹ Notably, the *Gamez* court cited *Green*¹⁷⁰ in holding that the definition of criminal street gang is not unconstitutionally vague.¹⁷¹

The California Court of Appeal rejected yet another vagueness and overbreadth challenge to the STEP Act in *In re Alberto R.*¹⁷² The defendant in *Alberto R.* challenged several statutory terms and phrases as

165. *Id.* at 146. The court distinguished a 1939 U.S. Supreme Court case, *Lanzetta v. New Jersey*, 306 U.S. 451, 458 (1939), in which a New Jersey “gangster” statute was declared unconstitutional for overbreadth because it punished membership in “any gang consisting of two or more persons.” The California Court of Appeal noted that the STEP Act does not criminalize membership in an undefined gang, as the New Jersey law did, but provides a specific definition of the term as used in the statute. *Green*, 278 Cal. Rptr. at 146-47. It further observed that the term “gang” as used in the STEP Act was similar to “enterprise” as used in RICO, and noted that courts had found little trouble defining the meaning of that term when applying RICO. *Id.* at 147.

166. 286 Cal. Rptr. 894 (Ct. App. 1991).

167. *Id.* at 901. Gamez also attempted to distinguish *Green* by arguing that *Green* did not address First Amendment freedom of association issues or “the outer boundaries of the statute’s application.” *Id.*

168. *Id.* at 901-02.

169. *Id.* at 902. The court argued that to the extent the Act regulates association, it only regulates those associations whose purpose is to engage in criminal activity, and, thus, it does not affect other, constitutionally protected forms of association. For an alternative view of this argument, see Molina, *supra* note 35, at 465-69.

170. *See supra* note 155.

171. 286 Cal. Rptr. at 902. “[W]hile the word ‘gang’ may be vague, the term ‘criminal street gang’ is not.” *Id.*

172. 1 Cal. Rptr. 2d 348 (Ct. App. 1991).

unconstitutionally vague and overbroad: "promote, further and assist";¹⁷³ "felonious criminal conduct";¹⁷⁴ "benefit";¹⁷⁵ "the last of these offenses occurred within three years after a prior offense";¹⁷⁶ and "primary activities."¹⁷⁷ The court rejected all of the defendant's arguments and upheld his sentence enhancements under the Act. The court held that the STEP Act is not void for vagueness because of the plain language of the statute and the judicial meaning of its terms.¹⁷⁸ If construed narrowly, the court held, the Act also is not overly broad because it punishes specific criminal conduct or the active promotion of criminal conduct.¹⁷⁹

The California STEP Act has also been challenged, unsuccessfully, on due process grounds, on the premise that the Act punishes individuals because of their associations with others instead of their specific intent.¹⁸⁰ In *Gamez*,¹⁸¹ for example, the defendant argued that his due process rights were violated because the prosecution did not prove his actual knowledge that other gang members had committed predicate crimes.¹⁸²

173. CAL. PENAL CODE § 186.22(a) (West Supp. 1994). The court held that this term has consistently been used by courts to describe "aiding and abetting" and thus has a precise judicial meaning. *Alberto R.*, 1 Cal. Rptr. 2d at 356.

174. CAL. PENAL CODE § 186.22(a) (West Supp. 1994). The court held that so long as this term is construed narrowly to cover only purely felonious conduct, that is, only conduct punishable in state prison, it passes constitutional scrutiny. *Alberto R.*, 1 Cal. Rptr. 2d at 356.

175. CAL. PENAL CODE § 186.22(b)(1) (West Supp. 1994). Although defendant urged a narrow interpretation of this term, to mean only when a gang-related crime is committed for profit, the court instead held it should be defined broadly in the context of the definition of "promote, further and assist." See *supra* note 173. "As so defined, the potential for vagueness or overbreadth is eliminated." *Alberto R.*, 1 Cal. Rptr. 2d at 356.

176. CAL. PENAL CODE § 186.22(e) (West Supp. 1994). Defendant argued that this provision could result in gang members being punished for future crimes of which they had no knowledge and in which they did not participate. The court called this argument "absurd" and pointed to both the knowledge and active participation provisions of the Act. *Alberto R.*, 1 Cal. Rptr. 2d at 356.

177. CAL. PENAL CODE § 186.22(f) (West Supp. 1994). Because the Act specifically lists what types of criminal conduct are required to trigger its provisions, the court said, this term does not make the law vague or overly broad. The court held that evidence of the gang's primary activities should be weighed by the trier of fact to determine whether criminal conduct was among those activities. *Alberto R.*, 1 Cal. Rptr. 2d at 356.

178. See *supra* notes 173-77 and accompanying text.

179. See *supra* notes 175-76, 178 and accompanying text.

180. In order for a state to punish an individual for being a member of an organization engaged in illegal activity, the state must prove that the individual was aware of the group's conduct and either shared its goals or specifically intended to further its illegal activities. *Scales v. United States*, 367 U.S. 203, 223-28 (1961); see also Annalisa Kelso, Comment, *Review of Selected 1988 California Legislation: Street Terrorism Enforcement and Prevention Act*, 20 PAC. L.J. 543, 548-49 (1989).

181. 286 Cal. Rptr. 894 (Ct. App. 1991).

182. *Id.* at 903. Defendant was challenging a sentence enhancement under subsection (b) of the Act, which, unlike subsection (a), does not contain a knowledge requirement as to the commission of

The court refused to read a knowledge requirement into the sentence enhancement portion of the Act¹⁸³ and held that the lack of such a knowledge requirement does not punish "pure" association because of the specific intent requirement in subsection (b).¹⁸⁴

Other critics have suggested that the STEP Act may impermissibly intrude upon freedom of association rights.¹⁸⁵ Freedom of association protects the right to associate with others even if they are engaged in criminal activity. These claims are examined under a strict scrutiny standard:¹⁸⁶ the government must show that the law is designed to further a compelling governmental interest that cannot be achieved by less restrictive means.¹⁸⁷ Some have argued that the STEP Act and similar laws will not survive strict scrutiny review if they are ever challenged before the Supreme Court.¹⁸⁸ However, one court has held that freedom of association loses its First Amendment protection when the association takes place for the purpose of planning criminal activity.¹⁸⁹ If anti-gang

predicate acts by gang members. *See id.* at 903 n.5.

183. The court held that the two provisions punish separate conduct. "The gravamen of subdivision (a) is the participation in the gang itself," which requires knowledge of the gang's criminal activities. *Id.* at 903. The sentence enhancement provisions, on the other hand, punish crimes committed with the specific intent to further or promote the gang's criminal conduct. This subsection thus does not require knowledge of the gang's specific activities because it has a specific intent provision of its own. *Id.* at 903-04.

184. "The requirement that defendant commit the crime for the benefit of or in the association with the gang and with the specific intent to promote, further, or assist members of the gang in any criminal conduct is sufficient to appease any concerns regarding a violation of due process based upon 'pure association.'" *Id.* at 905; *see also* *People v. Rodriguez*, 26 Cal. Rptr. 2d 660, 664 n.2 (Ct. App. 1993) (citing *Green* and observing that "[m]ere membership in a street gang is not a crime. . . . [The STEP Act] carefully avoids punishing mere membership.>").

185. *Molina*, *supra* note 35, at 466-69. This view attempts to make a distinction based on other groups who engage in both lawful and unlawful activities, such as Native American tribes who use peyote as part of their religious rituals. Under this argument, a STEP-type approach would punish a member of such a tribe both for the illegal peyote use and for belonging to the group that uses peyote. *Id.* at 467. This analysis, however, ignores STEP's requirement that a gang have as one of its primary activities the commission of crimes in order for active gang participation to be punishable under the Act. In the case of the Native American tribes, though it can certainly be said that their religious rituals are one of their primary activities, the use of peyote, in and of itself, clearly is not. This view also ignores the judicial meaning of the terms "active participation" and "promote, further and assist" as courts in California and elsewhere have construed them. The STEP Act punishes conduct that is significantly more purposeful than mere association.

186. *See NAACP v. Alabama*, 357 U.S. 449, 460-61 (1958).

187. *Id.* at 463-65.

188. *Molina*, *supra* note 35, at 469.

189. In *United States v. International Bhd. of Teamsters*, 708 F. Supp. 1388 (S.D.N.Y. 1989), the District Court for the Southern District of New York rejected an attempt by a union to dismiss a civil RICO claim against it on grounds that the lawsuit violated the union members' free-association rights.

statutes are tailored narrowly enough to encompass only clearly criminal conduct, freedom-of-association rights will not be implicated or chilled.

The anti-gang laws of Florida, South Dakota and Illinois are also susceptible to challenge on freedom-of-association grounds, though these challenges have yet to materialize. Under the Florida and South Dakota laws, a person could meet the statutory definition of a gang member simply by living in a gang area, associating with known gang members, and being stopped in the company of gang members more than four times.¹⁹⁰ These criteria would then trigger the sentence enhancements for gang-related crimes.¹⁹¹ Even though these penalties cannot be imposed in the absence of specific criminal activity by a particular defendant, an extended prison term could be imposed solely because of a person's *association* with gang members.¹⁹² Similarly, because Illinois' definition of gang member

Although First Amendment protection extends to association with individuals who are involved in criminal conduct, the court held that this was not a case of such pure association. "[W]hen such association is part of a plan to commit a crime it no longer is protected. Otherwise, it is apparent that any RICO enterprise or conspiracy could never be prosecuted because they all involve 'association.' 'Freedom of association' is not, however, a talisman that will ward off all government attempts to proscribe or regulate activity." *Id.* at 1393. The STEP Act and similar statutes are not directed at gang associations per se, but only criminalize those associations whose purpose is the planning and/or commission of criminal acts.

190. The two laws have nearly identical statutory definitions of "gang member." *See* FLA. STAT. ANN. § 874.03(2) (West 1994); S.D. CODIFIED LAWS § 22-10-14(2) (Supp. 1994).

191. *See* FLA. STAT. ANN. § 874.04 (West 1994); S.D. CODIFIED LAWS ANN. § 22-10-15 (Supp. 1994).

192. Both statutes impose additional penalties for felonies or violent misdemeanors that are part of a pattern of gang activity. FLA. STAT. ANN. § 874.04 (West 1994); S.D. CODIFIED LAWS ANN. § 22-10-15 (Supp. 1994). Under both statutes, a pattern of gang activity includes the commission, attempted commission, or solicitation *by any member or members of a gang* of two or more felonies or violent misdemeanors within a three-year period. FLA. STAT. ANN. § 874.04 (West 1994); S.D. CODIFIED LAWS ANN. § 22-10-14 (Supp. 1994). South Dakota imposes the additional requirement that the offenses be undertaken "for the purpose of furthering gang activity." *Id.* § 22-10-14.

Both statutes define gang member as a person who engages in a pattern of gang activity. If the definition ended there, the laws would pose no freedom-of-association problem; for purposes of freedom-of-association analysis, they would be equivalent to the portion of the California STEP Act that provides enhancements for crimes committed with the specific intent to further gang activity. *See supra* notes 182-84 and accompanying text. Because the laws define a gang member as a person who meets only two of several criteria, three of which are distinctly associational in nature, they run the risk of punishing those who, though their crimes are committed to further gang activity, are not members of a gang but merely associate with members of a gang.

As an example, suppose that Tony wants to join the Jets, a gang that qualifies under the Florida and South Dakota definitions. Tony is asked to commit a crime, say armed robbery, in order to obtain membership. Tony tries to rob a convenience store but flees when the clerk sets off an alarm. The gang asks him to try again. This time he is successful. Because a pattern of gang activity includes *attempted* crimes, Tony has now participated in a pattern of gang activity under the two statutes. But then suppose

includes "any person who . . . voluntarily associates himself with a course or pattern of gang-related criminal activity,"¹⁹³ sentence enhancements for gang-related forcible felonies¹⁹⁴ could be imposed on a person who merely associates with a gang but is not an actual member.¹⁹⁵

that the gang nevertheless denies him membership. Under these statutes, Tony would still be subject to gang-related sentence enhancements for his crimes if he lived in the gang's area, "hung out" with the gang members and adopted their style of dress, and if he had been "hanging out" with known members of the Jets when they were stopped or questioned by the police on at least four occasions. Although Tony would in any event be subject to punishment for his crimes, the additional penalties would be imposed solely because of his association with gang members.

193. ILL. ANN. STAT. ch. 740, para. 147/10(2)(J) (Smith-Hurd Supp. 1994).

194. *Id.* ch. 730, para. 5/5-5-3(c).

195. The constitutional problems with Illinois' gang-related sentencing guidelines are compounded by poor drafting. The relevant portion of the state criminal disposition statute prevents probation and requires a mandatory minimum sentence for a forcible felony "if the offense was related to the activities of an organized gang." ILL. ANN. STAT. ch. 730, para. 5/5-5-3(c)(2)(J) (Smith-Hurd Supp. 1994). Similarly, sentence enhancements are provided for crimes committed in a school or on a school bus "where the offense was related to the activities of an organized gang." *Id.* ch. 730, para. 5/5-5-3(c)(11). Both provisions incorporate the definition of "organized gang" contained in the Streetgang Terrorism Omnibus Prevention Act. *See id.* ch. 740, para. 147/10. This is the only term from the STOP Act mentioned in the criminal disposition statute. Therein lies the problem. Did the Illinois Legislature intend to incorporate *only* the definition of "gang" from the Act into the criminal disposition statute, or did it also intend courts to use the Act's definition of "gang-related" in determining which crimes would be subject to the sentencing guidelines?

If the first interpretation is used, it is clear that these provisions sweep too broadly, since the offenses in question need only be "related" to the activities of a gang. To continue the example from note 192, *supra*, suppose Tony has a girlfriend, Maria. She helps Tony escape after the first robbery attempt by shooting at Officer Krupke, who was pursuing Tony. She has committed a forcible felony, assault on a police officer, which is related to the activities of a gang. Therefore, if she is prosecuted and convicted, she may not be granted probation and must be given the minimum statutory prison term. These provisions would be triggered even if she were not a member of the Jets, but her conduct was related to activities of Tony and members of the gang.

The definition of "gang-related" crime contained in the STOP Act, by contrast, requires both specific intent to aid or benefit the gang by committing the crime and the direction, authorization, ratification, or consent of an officer or policymaking representative of the gang. *See* ILL. ANN. STAT. ch. 740, para. 147/10 (Smith-Hurd Supp. 1994). This definition creates fewer freedom-of-association problems, but because it does not state that only "gang members" as defined under the statute can commit gang-related activity, it creates a risk that nongang members may commit gang-related crime under the statute. Even if this definition were to be restricted to crimes committed only by gang members, the definition of that term is itself so broad that it can extend to those who merely associate with gang members. Under the statute, gang members include those who "voluntarily associate themselves" with a pattern of gang-related criminal activity, including those who cover up for the activity or aid and abet the crime. *Id.* Thus, Maria could qualify as a gang member for shooting at Officer Krupke even if her only contact with the gang came through Tony.

At a minimum, the Illinois laws should be amended to show more clearly which definitions Illinois intended to use in its sentencing guidelines. If the guidelines were to use the STOP Act's definitions of gang-related crime, then those definitions should be amended to clarify whether gang members (as defined by the statute) are the only ones who can commit gang-related crimes (as defined by the

Although the California STEP Act and its progeny have thus far survived all constitutional challenges, these laws could be revised to reduce their impact on individual rights without reducing their effectiveness against gangs.¹⁹⁶ For those states that have rejected the California approach, the positive effects of their laws in combatting gang activity do not outweigh the harm caused by their infringement on the rights of the individual. Thus, states that have not yet enacted anti-gang statutes should reject this latter approach and opt for a California-style law with increased individual protections.¹⁹⁷

B. Practical Problems

Practical questions about the application of the STEP Act center on the establishment of gang membership and a pattern of gang activity. Courts in California and elsewhere have upheld the use of expert testimony by police officers, even if such testimony is based in part on hearsay,¹⁹⁸ in order to establish gang membership and the conduct of the gang in question. Some object to this practice, arguing that such testimony should be excluded because police officers' mere presence on the beat does not transform them into experts in gang activity.¹⁹⁹ Clearly, it should be left

statute). Finally, if gang-related crimes are restricted only to statutory "gang members," the specific intent requirements found in the gang-related crime definitions should be imported into the gang membership definition. This would ensure that only those with a substantial relationship to the gang unit itself are covered by these provisions.

196. See *infra* notes 248-49 and accompanying text.

197. See *infra* Part V.

198. See, e.g., *People v. Gamez*, 286 Cal. Rptr. 894, 899-900 (Ct. App. 1991). Similar evidence has been upheld in jurisdictions without anti-gang statutes in which gang membership is nonetheless considered as an aggravating circumstance at sentencing. See *State v. Johnson*, 873 P.2d 514, 521-22 (Wash. 1994); *Anderson v. State*, 868 S.W.2d 915, 917-18 (Tex. Ct. App. 1994); see also *People v. Colon*, 618 N.E.2d 1067, 1072 (Ill. App. Ct. 1993) (holding evidence of gang affiliation, activity or involvement admissible "only when there is sufficient evidence demonstrating that the gang activity relates to the crime charged and that the defendant was aware that gang activity was involved") (citations omitted).

199. See, e.g., *Burrell*, *supra* note 37, at 770. "The fact that officers have been assigned to the 'gang detail' or have made many arrests in gang related cases is not sufficient to qualify them as experts," argues Susan Burrell. *Id.* "Nor does street experience transform officers into behavioral scientists who can predict individual or group behavior." *Id.* at 771. To support her theory, Burrell cites the lack of a coherent body of knowledge on the subject of gang behavior or gang activity. *Id.*; see also *supra* notes 40-41, 67-95 and accompanying text. *But see State v. Seddens*, 878 S.W.2d 89, 92-93 (Mo. Ct. App. 1994). The Missouri Court of Appeals upheld the expert testimony of a police officer, whose primary responsibility was investigating gang activity, about the practices, activities and history of the Crips and Bloods in St. Louis. *Id.* at 93. Any lack of formal training in gang activity (the officer had spent only fourteen days at professional seminars on the subject) went to the weight of the evidence, not its

to the judgment of the legislature whether to allow this type of evidence. A legislature could use either a specific rule of evidence²⁰⁰ or a general rule on expert testimony by which police officers and others familiar with gang activity could qualify as experts.²⁰¹ Before enacting such a rule, however, the legislature should weigh the benefits of this type of evidence against the possible risks to gang defendants.

IV. ENTERPRISE CRIMINALITY AND ORGANIZED CRIME

When the federal RICO²⁰² statute was enacted in 1970, it was hailed as a "new approach[] [to organized crime] that will deal not only with individuals, but also with the economic base through which those individuals constitute such a serious threat."²⁰³ Thus, RICO was enacted because existing laws proved inadequate in battling organized crime.²⁰⁴ Similar problems have prompted states to pass anti-gang laws.²⁰⁵ Because RICO focuses on enterprise criminality instead of individual crimes, it is

admissibility. *Id.* at 92. Furthermore, the officer had interviewed roughly sixty gang members during his investigations. "A witness may be qualified to testify as an expert although his knowledge may have been gained by practical experience rather than by scientific study or formal training." *Id.*

200. Nevada's anti-gang laws make use of such a provision, allowing for the use of expert testimony under certain circumstances. The statute does not address whether police officers may serve as experts on gang activity. NEV. REV. STAT. § 193.168.5 (Michie Supp. 1993).

201. For example, in states that have adopted the Federal Rules of Evidence, police officers could qualify as experts if their knowledge about gangs will assist the trier of fact to understand the evidence or determine a fact in issue. FED. R. EVID. 702. In such states, officers could testify as gang experts even in the absence of any specific statute authorizing testimony on gang activities or culture.

202. 18 U.S.C. §§ 1961-1964 (1988 & Supp. IV 1992).

203. S. REP. NO. 617, 91st. Cong., 1st Sess. 79 (1969).

204. In a 1969 message on organized crime, President Nixon noted some of these problems. "The arrest, conviction and imprisonment of a Mafia lieutenant can curtail operations, but does not put the syndicate out of business. As long as the property of organized crime remains, new leaders will step forward to take the place of those we jail." 116 CONG. REC. 602 (1970) (citing President Nixon's April 23, 1969 message on organized crime). Upon introducing the original RICO legislation, Senator John McClellan echoed Nixon's remarks. "Our present laws are inadequate to remove criminals from legitimate-endeavor organizations. Constant references have been made to the frustration resulting when the only consequence of a conviction is that organized crime and its infiltrated organizations are run by a new leader, and the organizations which are the real threat are not affected." 115 CONG. REC. 9567 (1969). Although this statement relates largely to the infiltration of legitimate businesses by organized crime, its observations about the problems of fighting organized crime with traditional laws are no less true when applied to wholly illicit organizations. Moreover, Senator McClellan went on to say that under RICO, "If an organization is acquired or run by the proscribed racketeering method, then the persons involved are removed from the organization." *Id.* (emphasis added). This indicates that RICO was enacted to combat the twin evils of enterprise criminality: the corrupt organization itself and the poisoning of legitimate groups and businesses by organized crime.

205. See *supra* note 12 and accompanying text.

an extraordinarily effective tool against all forms of organized crime²⁰⁶ and has appropriately served as a model for the California STEP Act and other state anti-gang laws.

RICO provides three bases for criminal liability. Section 1962(a) prohibits the use of income acquired through a pattern of racketeering activity²⁰⁷ to obtain an interest in an enterprise²⁰⁸ that affects interstate commerce.²⁰⁹ Section 1962(b) forbids the acquisition of any interest in a RICO enterprise through a pattern of racketeering activity or collection of an unlawful debt.²¹⁰ Finally, Section 1962(c) makes it illegal to conduct an enterprise through a pattern of racketeering activity or collection of unlawful debt.²¹¹ Conspiracy to violate any of these three sections is also a RICO violation.²¹² A similar law, the federal Continuing Criminal Enterprise²¹³ (CCE) statute, also attacks enterprise criminality. A continuing criminal enterprise is defined as a continuing series of drug violations by five or more people. Liability is based on the occupation of a position of supervision or management and the commission of a drug felony that is part of the series.²¹⁴

The enactment of RICO and CCE in 1970 marked the first appearance of criminal forfeiture in the United States since Congress outlawed the

206. "Buried in RICO's legalese is a simple insight. In this century, organizations control the important elements of society, such as commerce and labor. Yet the criminal law prior to RICO had, for the most part, addressed only individuals." Gregory J. Wallace, *Outgunning the Mob*, A.B.A. J., Mar. 1994, at 60, 62. RICO, by contrast, focuses on the organization. As its drafter, Robert Blakey, explained, "It's not enough to investigate individuals—you need a theme. You've got to go after the organization. Individuals commit organized crime, but organizations make the organized crime possible." *Id.* at 63.

207. Section 1961(1) defines "racketeering activity" as any one of a long list of federal crimes, ranging from sports bribery to mail and wire fraud to money laundering, as well as any act or threat that involves murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or drug dealing that is chargeable under state law and punishable by more than a year in prison. 18 U.S.C. § 1961(1) (Supp. IV 1992). A "pattern of racketeering activity" is established by the commission of at least two § 1961(1) predicate crimes within 10 years of each other. 18 U.S.C. § 1961(5) (1988).

208. An "enterprise" is defined under § 1961(4) as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." *Id.* § 1961(4).

209. *See id.* § 1962(a).

210. *Id.* § 1962(b). An unlawful debt is defined under § 1961(6) as a debt incurred by illegal gambling, or resulting from a loan in which the interest rate is at least twice the enforceable interest rate under state or federal law. *Id.* § 1961(6).

211. *Id.* § 1962(c).

212. *Id.* § 1962(d).

213. 21 U.S.C. § 848 (1988 & Supp. IV 1992).

214. 21 U.S.C. § 848(c) (1988).

practice in 1790.²¹⁵ Congress added criminal and civil forfeiture provisions to RICO not merely as an additional punishment, but to eliminate a defendant's control over the enterprise and prevent the defendant from receiving the benefits of the illegal activities.²¹⁶ Forfeiture provisions "allow the government to reach the illegally accumulated assets of a criminal enterprise and thereby strike at the heart of such enterprises."²¹⁷

Upon conviction, RICO requires forfeiture of, *inter alia*, any proceeds derived from racketeering activity.²¹⁸ Section 1963(a)(3), which allows forfeiture of profits obtained from organized crime, was added in a 1984 amendment to RICO. This amendment codified the Supreme Court's

215. Frederick P. Hafetz, *Criminal RICO: Forfeiture*, in RICO: CIVIL AND CRIMINAL LAW AND STRATEGY § 6.03[1], at 6-7 (Jed S. Rakoff & Howard W. Goldstein eds., 1991).

216. *Id.* § 6.04[1], at 6-9.

217. ALEXANDER S. WHITE ET AL., U.S. DEP'T OF JUSTICE, RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS (RICO): A MANUAL FOR FEDERAL PROSECUTORS 76 (1985); *see also supra* note 24 and accompanying text. Criminal forfeiture, and in personam forfeitures in general, have their origins in the English common law, which allowed forfeiture of estate on the theory that a breach of the peace should deprive the guilty party of the right to own property. William W. Taylor III, *Forfeiture Under 18 U.S.C. § 1963—RICO's Most Powerful Weapon*, 17 AM. CRIM. L. REV. 379, 381-82 (1980). This practice, however, was severely restricted by later developments, initially the Magna Carta in 1215. The thirty-second clause of the Magna Carta announced that forfeited lands would be returned to their original owners within a year and a day. *Id.* at 382 n.21. This effectively abolished forfeiture of an estate on a felony conviction in England. *Id.* at 382. Later, the abolition of both escheat for felony and forfeiture on a conviction of treason in 1870 further reduced forfeiture actions. Previously, all real estate automatically escheated to the Crown upon conviction of a felony. Hafetz, *supra* note 215, § 6.03[1], at 6-7.

The only criminal forfeiture provisions in the United States Constitution are found in Article III, which allows forfeiture of estate as a punishment for treason, but this only applies during the life of the person convicted. U.S. CONST. art. III, § 3, cl.2 ("The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted."). The first Congress codified the negative implication of Article III's reference to forfeiture in 1790 when it enacted the first U.S. criminal code and outlawed forfeiture for all criminal offenses other than treason. Act of Apr. 30, 1790, ch. 9, § 24, 1 Stat. 112 (1790) ("[N]o conviction or judgment for any of the offenses aforesaid, shall work . . . any forfeiture of estate."). Criminal forfeiture thus disappeared from American criminal jurisprudence and did not reappear for 180 years. Civil forfeiture, on the other hand, has been in continual use in America. Early civil forfeiture statutes provided for civil in rem proceedings to confiscate the proceeds of illegal activities. These were based on the legal fiction that the property, not its owner, was in violation of the law, and thus a penalty issued in rem against the property was proper. Hafetz, *supra* note 215, § 6.03[2], at 6-7 to 6-8.

218. Section 1963(a)(3) provides that any person convicted of a RICO violation *shall* forfeit "any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity." 18 U.S.C. § 1963(a)(3) (1988). Federal prosecutors are instructed that the forfeiture provisions "are an integral part of a RICO prosecution and should be used wherever possible." WHITE ET AL., *supra* note 217, at 76.

holding in *Russello v. United States*²¹⁹ that “interest” as defined under RICO was broad enough to include profits derived from a RICO enterprise.²²⁰ The CCE forfeiture provisions mandate forfeiture of any profits derived from the enterprise, any property used to commit the underlying drug offenses, and any interest the defendant has which affords control over the enterprise.²²¹

The rights of third parties may be implicated when property is forfeited under RICO or CCE. For example, property may be forfeitable because it was used in a drug transaction or purchased with profits derived from such a transaction. Because a violation of the underlying criminal statute is required before forfeiture proceedings can begin, forfeitable property may be subject to a restraining order to preserve the property until after the trial is complete.²²² Such restrictions are necessary to prevent defendants from transferring their property before trial, thereby avoiding the forfeiture provisions.²²³ These restrictions also provide an incentive for third parties to monitor how their property is used or from what source it is derived.²²⁴ After forfeiture, the government must publish an announcement that the

219. 464 U.S. 16 (1983).

220. *Id.* at 22; *see also* Hafetz, *supra* note 215, § 6.04[2], at 6-9 to 6-10.

221. 21 U.S.C. § 853(a) (1988). These provisions are comparable to the RICO forfeiture law and are generally applied in the same fashion. 1 ASSET FORFEITURE OFFICE, U.S. DEP'T OF JUSTICE, ASSET FORFEITURE: LAW, PRACTICE AND POLICY 158 (1988). As a practical matter, however, property forfeitable under 21 U.S.C. §§ 853(a)(1) and (2), which apply to non-CCE drug violations, will probably be the same as forfeitable property under subsection (3), which only applies to CCE violations. *Id.* at 158 n 53.

222. RICO and CCE both provide for such restraining orders. Under RICO, potentially forfeitable property can be preserved by injunction or restraining order without a hearing upon the filing of a RICO indictment, *see* 18 U.S.C. § 1963(d)(1)(A) (1988), and prior to indictment if the restraining order is necessary to avoid transfer or destruction of the property. *Id.* In the latter case, notice and a hearing is provided to those with a possible interest in the property, and the restraining order cannot be issued if the need for preservation is outweighed by the hardship on a party with an interest in the property. The CCE law contains an identical provision. 21 U.S.C. § 853(e) (1988). Under the “relation back” doctrine, title in forfeitable property vests in the government at the time the criminal act in question is committed. Third-party transferees may escape this provision if they establish at a hearing that they were bona fide purchasers for value who were “reasonably without cause to believe that the property was subject to forfeiture” at the time of transfer. *See* 18 U.S.C. § 1963(c) (1988).

223. Goldsmith & Linderman, *supra* note 24, at 1256. In fact, the Supreme Court pointed to such needs in holding that property could be seized without a prior hearing under a Puerto Rico statute that made vessels used to transport drugs subject to forfeiture. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 679 (1974). Prior notice, the Court argued, “might frustrate the interests served by the statutes, since the property seized—as here, a yacht—will often be of a sort that could be removed to another jurisdiction, destroyed or concealed.” *Id.*

224. “[Forfeiture] may have the desirable effect of inducing [third parties] to exercise greater care in transferring possession of their property.” *Calero-Toledo*, 416 U.S. at 688.

property has been forfeited and will be disposed of.²²⁵ Third parties can then assert their interests,²²⁶ though they will prevail only under limited circumstances.²²⁷

Because of these powerful forfeiture provisions, and, more importantly, because they specifically address organized rather than isolated criminal activity, RICO and CCE have been successfully employed against criminal street gangs.²²⁸ Gangs were being prosecuted under RICO as early as the mid-1980s.²²⁹ By the early 1990s, the CCE statute was also being used against gangs that engaged in drug trafficking.²³⁰ For example, the first

225. 18 U.S.C. § 1963(l)(1) (1988).

226. *Id.* § 1963(l)(2).

227. Because of the relation-back doctrine, a third party challenging forfeiture under this section has the burden of proof by a preponderance of the evidence. Such a challenge will succeed if the property interest belonged to the petitioner, not the defendant, at the time the acts were committed, or if the petitioner was a bona fide purchaser for value with no reasonable cause to believe the property was subject to forfeiture at the time of purchase. *Id.* § 1963(l)(6). Goldsmith and Linderman have proposed that these provisions be changed to shift the burden to the government to show, again by a preponderance of the evidence, that the owner knew of the illegal conduct or acted with reckless indifference to such conduct. For transfers between family or friends, the government would have to show that the transferee knew or had reason to know of the underlying criminal conduct. Goldsmith & Linderman, *supra* note 24, at 1298.

228. Federal prosecutors brought RICO indictments against roughly two dozen gangs nationwide in 1994, about twice as many as had been obtained in 1993. Matthew Purdy, *Using the Racketeering Law to Bring Down Street Gangs*, N.Y. TIMES, Oct. 19, 1994, at A1. This includes anti-gang initiatives in New York City; Buffalo, New York; Shreveport, Louisiana; and Omaha, Nebraska. *Id.* at B5.

RICO and similar laws are so effective against gangs (and against organized crime in general) because they allow the government to put the organization itself on trial. As one defense lawyer observed: "Before RICO, you were not even allowed to utter a word about La Cosa Nostra [the Mafia] in a courtroom. But with RICO, not only are you allowed to talk about the criminal organization, you're required to prove the existence of it." Newton, *supra* note 12, at A27. The same, of course, is true of gangs. "We are intentionally trying to use the Federal Government's prosecution weapons to bring down a whole enterprise, rather than one murder here and one murder there," said a Justice Department official. Purdy, *supra*, at B5. However, this high level of success has some people worried. "The idea of these [RICO] mega-trials is that the jury gets to see all these drugs and all these guns, and they hear about all these awful things that the gang did. [The jurors] freak out. Then they convict everybody," said a defense lawyer in the El Rukn prosecutions. Newton, *supra* note 12, at A27.

However, prosecuting gangs under RICO and similar laws is not exactly the judicial equivalent of shooting fish in a barrel. "It can be a time-consuming and expensive process to prove that the gang is a criminal enterprise." In making out a RICO case, prosecutors must rely on wiretaps, confidential informants and gang members turning state's evidence. For example, the federal investigation of the El Rukn gang in Chicago began in 1987, with indictments handed up in 1989 and trials which ended in 1992 and 1993. *Id.*

229. See, e.g., *United States v. Louie*, 625 F. Supp. 1327, 1333-34 (S.D.N.Y. 1985) (holding that RICO indictment alleging "broad spectrum of illegal fundraising acts" and territorial disputes with rival gangs sufficient to establish pattern of racketeering activity under RICO).

230. See *United States v. Jackson*, 953 F.2d 640 (4th Cir. 1992).

RICO prosecution of a Washington, D.C., drug gang took place between 1991 and 1992 against a gang known as the R Street Organization.²³¹

The RICO prosecutions of the El Rukn gang²³² in Chicago in the late 1980s and early 1990s rank simultaneously as the most successful use of RICO against criminal street gangs and its most spectacular failure. The El Rukn prosecutors racked up an impressive series of RICO convictions²³³ against one of the most notorious street gangs in America, validating the use of RICO as a powerful gang-fighting tool.²³⁴ However, allegations of large-scale prosecutorial misconduct²³⁵ have resulted in new trials for

231. See *United States v. Williams-Davis*, 821 F. Supp. 727, 731 (D.D.C. 1993).

232. The specter of Al Capone is often invoked in discussions of the El Rukn gang, which has been called "the most infamous [gang] of organized criminals that Chicago has seen since the days of Al Capone," *United States v. Boyd*, 833 F. Supp. 1277, 1365 (N.D. Ill. 1993), and Chicago's "most violent and organized ring of gangsters since Al Capone's." Robert Blau, *Too Close for Comfort? How the Government's Assault on the Rukns Went Up in Smoke*, CHI. TRIB. Aug. 21, 1994, at 10 (Sunday Magazine).

Originally formed in the 1960s as the Blackstone Rangers, the gang was known as the Black P Stone Nation in the 1970s. When Jeff Fort became the undisputed leader of the gang in the 1980s, the group was renamed again, calling themselves the El Rukns, meaning "cornerstone." Fort and the El Rukns embraced certain elements of the Black Muslim faith, which extended to their organizational structure. Fort ruled the gang as "Imam." Subordinate ranks, in descending order, were called generals, "Officer Muftis," ambassadors, and, at the lowest level, the soldiers or "Els." Their headquarters was known as the Mosque, and religious services were actually held there on occasion. *United States v. McAnderson*, 914 F.2d 934, 939 (7th Cir. 1990).

The El Rukns ran a sophisticated drug-trafficking operation "which at its peak sold multiple kilograms of cocaine monthly . . . [and] generated between \$3 million and \$4 million in profits." Blau, *supra*, at 14. The money was hidden under the basement of the gang's South Side headquarters and in safe deposit boxes in Chicago and Milwaukee. *Id.* "The number of murders linked to the Rukns in their 20-year history ranges from the two dozen outlined in the [federal] indictments to many times that number suspected by police." *Id.*

233. Federal prosecutors in Chicago obtained more than 50 convictions against the El Rukns. Matt O'Connor, *Judge Implies Rukn Scandal Growing Worse*, CHI. TRIB., Nov. 13, 1993, at 5.

234. See, e.g., *United States v. Andrews*, 749 F. Supp. 1520, 1524 (N.D. Ill. 1990) (holding RICO not unconstitutionally vague as applied to street gang involved in large-scale drug conspiracy).

235. The allegations of misconduct are staggering in their sheer number; the opinion in one case, granting a new trial for seven gang members, alone covers 86 pages of the Federal Supplement. *Boyd*, 833 F. Supp. at 1280-1366. The government allegedly used perjured testimony by gang members; suppressed positive drug tests by Rukn generals testifying for the prosecution; allowed those witnesses to use drugs while confined in Chicago's Metropolitan Correctional Center (MCC); provided for conjugal visits between the witnesses and their wives; and gave other substantial benefits to the incarcerated witnesses, including money, gifts, clothing, radios, beer, cigarettes and access to government phones. A paralegal in the U.S. Attorney's office also allegedly engaged in a sexually explicit phone conversation with a witness and agreed to help smuggle contraband into the jail. These activities were not disclosed to the defense. See *Boyd*, 833 F. Supp. at 1277-95; *United States v. Burnside*, 824 F. Supp. 1215, 1224-48 (N.D. Ill. 1993); *Andrews*, 824 F. Supp. at 1277-87; see also Matt O'Connor, *Ruling Threatens Rukn Convictions*, CHI. TRIB., June 5, 1993, at 1.

fifteen defendants,²³⁶ requests for new trials by about two dozen others,²³⁷ and attempts to withdraw guilty pleas by several of the seventeen gang members who struck plea bargains with the prosecution.²³⁸ It seems unlikely that all of those whose convictions were overturned will be retried.²³⁹

Despite the disastrous collapse of the El Rukn prosecution, RICO and similar laws such as the California STEP Act remain a powerful tool against criminal street gang activity. There is ample evidence to suggest that the problems that plagued the El Rukn prosecution were attributable to an "incendiary mix" of factors, none of which has anything to do with RICO itself.²⁴⁰ Moreover, the successful use of RICO to prosecute gangs

236. O'Connor, *supra* note 233, at 5; *New Trial Ordered for 2 Rukn Chiefs*, CHI. TRIB., Apr. 8, 1994, at 3 (Chicagoland); see *Boyd*, 833 F. Supp. at 1366; *Burnside*, 824 F. Supp. at 1272; *Andrews*, 824 F. Supp. at 1291.

237. O'Connor, *supra* note 233, at 5.

238. *Id.* Daniel J. Lehmann, *Judge to Let Some Rukns Try to Change Guilty Pleas*, CHICAGO SUN-TIMES, Sept. 22, 1993, at 11.

239. Lehmann, *supra* note 238, at 11. "The government's chief witnesses have been compromised," said a defense lawyer for a gang member whose conviction was overturned. "They have perjured themselves and accused each other of perjury . . ." *Id.*

In fact, by mid-1994, twelve of the fifteen Rukns who were given new trials had struck plea bargains with the prosecution and were sentenced to dramatically reduced prison terms. Several defendants were able to walk out of the courtroom as free men because their credit for time served exceeded the terms to which they had been sentenced. See Matt O'Connor, *7 Convicted Rukns Get a Break: Judge Cuts Sentences in Government-Misconduct Case*, CHI. TRIB., Dec. 22, 1993, at 3 (Chicagoland); Robert Becker, *Another Rukn Case Figure Gets a Pass*, CHI. TRIB., Jan. 28, 1994, at 4 (Chicagoland); *Rukn Sentences Cut After Bungled Trial*, CHI. TRIB., June 11, 1994, at 5; *2 Rukns Sentenced After Plea Bargain*, CHI. TRIB., Aug. 25, 1994, at 3 (Chicagoland). By contrast, Henry Leon Harris Jr., a former Rukn general and brother-in-law of Rukn leader Jeff Fort, who was at the center of the misconduct allegations, was sentenced to 30 years in prison and fined \$750,000. Matt O'Connor, *Rukn Informant in Botched Trials Gets 30 Years*, CHI. TRIB., June 14, 1994, at 1 (Chicagoland). Harris was one of the witnesses whose failed drug tests had been suppressed and who had received conjugal visits. *Id.* at 6. "Though some of the ambassadors had once faced possible life sentences, none will [now] spend more than eight years in prison . . ." *Id.* at 1.

240. Matt O'Connor & William Grady, *What Went Wrong in Rukn Cases? Nearly Everything*, CHI. TRIB., Sept. 26, 1993, at 1 (Chicagoland). Among the various reasons suggested for the Rukn scandal were overly aggressive prosecution by the lead assistant U.S. attorney, personality clashes, human frailty, a lack of supervision, and a sense of institutional arrogance on the part of the U.S. Attorney's office. *Id.* Some suggest that the determination that enabled lead prosecutor William Hogan Jr. to achieve his many victories against the notorious gang clouded his judgment and caused him to lose sight of the pursuit of justice. *Id.* One judge said that Hogan was "enticed by the prospect of convicting some of the most notorious malefactors in Chicago history" and so provided extensive favors to his star witnesses, the former Rukn generals, to be sure they would cooperate. *Boyd*, 833 F. Supp. at 1334-35.

The judges who overturned the Rukn convictions emphasized that the misconduct was the work of but a few members of the U.S. Attorney's office, and went out of their way to praise the professionalism and principles of the rest of the office and of the other agencies involved in the Rukn prosecution.

elsewhere belies the suggestion that gang convictions under RICO cannot be obtained without illegal or improper inducements to gang member-witnesses such as those that doomed the El Rukn prosecution.²⁴¹ RICO and similar organized-crime statutes should continue to be employed, on both the federal and state level, in the fight against criminal street gang activity.

RICO, as its name suggests, was designed to fight organized crime²⁴² and was enacted precisely because existing laws were inadequate to do so. Previous responses to organized crime were unsuccessful because they concentrated on individuals rather than the criminal unit itself, which was able to survive even as its members were prosecuted.²⁴³ RICO, by contrast, focuses on the criminal enterprise. It does not punish mere status in an organization, as some have suggested, but punishes those who band together to commit crimes. This explains why RICO has been used so successfully against gangs,²⁴⁴ and, indeed, why California chose RICO as

Boyd, 833 F. Supp. at 1366 n.61; *Burnside*, 824 F. Supp. at 1272. One judge characterized the misconduct on Hogan's part as an anomaly, "atypical of [his] career as a prosecutor." Calling Hogan a "bright, talented and dedicated individual," the judge noted that "the course of conduct [Hogan] displayed throughout the El Rukn prosecution did not stem from malice, but rather arose from his well meant, but misguided, sense of justice." *Boyd*, 833 F. Supp. at 1335.

The collapse of the El Rukn prosecution, though extensive, was by no means complete; not every Rukn succeeded in overturning his conviction on the basis of governmental misconduct. *See, e.g., United States v. Bates*, 843 F. Supp. 437, 440-41 (N.D. Ill. 1994) (upholding convictions, despite "outrageous and totally unprofessional" conduct by U.S. Attorney's office, because testimony of witnesses in question was cumulative).

241. *See supra* note 235 and accompanying text.

242. "Concern with enterprise criminality provided the impetus for RICO." Michael Goldsmith, *RICO and Enterprise Criminality: A Response to Gerard E. Lynch*, 88 COLUM. L. REV. 774, 775 (1988). Goldsmith's article is a rebuttal to an article by Columbia law professor Gerard Lynch, in which Lynch asserts, *inter alia*, that RICO was never intended to reach wholly illicit enterprises such as organized crime syndicates themselves, but instead was designed to address the infiltration of legitimate businesses by illegal enterprises. *See generally* Gerard E. Lynch, *RICO: The Crime of Being a Criminal*, pts. I & II, 87 COLUM. L. REV. 661, 666-80, 920 (1987).

243. As Senator Robert Byrd observed in 1970, the increased prosecution and conviction of organized crime leaders proved unsuccessful at eradicating the problem of organized crime itself. "[S]uch convictions alone, which simply remove the leaders from control of syndicate-owned enterprises but do not attack the vested property interests whose control passes on to other . . . leaders, are not adequate to demolish the structure of the surviving organizations . . ." 116 CONG. REC. 607 (1970). "Since the structure and strength of organized crime transcend its membership, criminal enterprises could thrive despite successful individual prosecutions." Goldsmith, *supra* note 242, at 775 (citation omitted).

244. *See Burdett v. Miller*, 957 F.2d 1375, 1379 (7th Cir. 1992) (noting RICO aimed not only at formal enterprises "but also at criminal gangs, which have a less formal, a less reticulated and differentiated structure").

a model for its anti-gang legislation.

Criminal street gangs exist across generations, even though members grow up, are killed, or are prosecuted; only by attacking the gang itself can criminal street gang activity be eliminated. Thus, despite the collapse of the El Rukn prosecution, RICO should still be used to fight all types of organized crime, including street gangs. Similarly, state laws patterned after RICO, such as the California STEP Act, remain the most effective response to gangs at the state level.

V. A MODEL STREET GANG PREVENTION ACT

State statutes that target organized crime in general, and street gangs in particular, have proven effective in fighting the growing problem of criminal street gangs.²⁴⁵ However, these statutes must be drafted carefully. Imprudently written legislation may infringe upon gang members' First Amendment rights of free expression and association or violate constitutional guarantees of due process. What follows is proposed legislation that should serve as a model for both new anti-gang laws and the amendment of existing laws.

Section 1(a) of this Model Act takes the definition of "pattern of street gang activity" from the California STEP Act, defining such a pattern as the commission of two or more predicate crimes within three years.²⁴⁶ The

245. See *supra* Part IV.

246. Under § 1(a), "pattern of criminal street gang activity" means the commission, attempted commission, or solicitation of two or more of the following offenses, within three years of each other, provided the offenses are committed either on separate occasions or by two or more persons:

- (1) Murder or any lesser included offense;
- (2) Assault with a deadly weapon;
- (3) Aggravated robbery;
- (4) Sale, possession with intent to deliver, transportation, or manufacture of controlled substances as defined under the state's health code;
- (5) Arson;
- (6) Witness tampering or intimidation;
- (7) Grand theft auto.

The list of predicate crimes is merely a starting point. Additions to the list should reflect the criminal gang activity in the relevant state. See *infra* note 247. All the predicate acts must already be independently punishable crimes under state law, or must be made so through concurrent legislation. As has been noted in the RICO context, this type of legislation is not a criminal statute in the strictest sense of the word. "[RICO] does not make criminal conduct that before its enactment was not already prohibited, since its application depends on the existence of 'racketeering activity' that violates an independent criminal statute." G. Robert Blakey & Brian Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009, 1021 n.71 (1980). Here, too, the model anti-gang statute does not punish conduct that is not already criminal, but rather the commission of such crimes in an organized fashion. For example, one of the California STEP

list of predicate acts must be narrowly tailored to include only the types of criminal activities in which street gangs in a given state or area tend to be involved.²⁴⁷ Section 1(b) defines "street gang" as a group or association of three or more people with an identifying sign, name or symbol, whose primary activity is the commission of one or more predicate acts²⁴⁸ and whose members individually or collectively engage in a pattern of criminal gang activity.²⁴⁹ This definition reduces any chilling effect an anti-gang statute might have on freedom of association by more explicitly targeting major criminal gangs, rather than gangs whose criminal conduct is a less integral part of their activity.

Under section 1(c), expert testimony may be presented by either party on issues of gang activity, history and customs.²⁵⁰ The prosecution, for

Act predicate crimes is shooting at an inhabited dwelling or occupied motor vehicle, which is itself prohibited by the California Penal Code. Even though this crime is consistent with gang activity in California (and elsewhere), it could not be included in the STEP Act unless it was independently punishable under state law. *See* CAL. PENAL CODE §§ 186.22(e)(5), 246 (West Supp. 1994).

247. By narrowly tailoring the list of predicate crimes to match the conduct of gangs in a particular state, anti-gang legislation can survive constitutional challenges for overbreadth and vagueness. *See supra* note 33 and accompanying text. In addition, if a state does not have a significant problem with "traditional" street gangs, but instead is plagued by other forms of organized crime (such as motorcycle gangs), it could pass an anti-gang law specifically aimed at those types of gangs, again by establishing a list of predicate crimes that addresses the criminal conduct typically engaged in by such gangs.

248. This is a modification of the California STEP definition of street gang, which can be met if criminal activity is only *one* of the gang's primary activities. *See supra* note 129 and accompanying text.

249. This provision rejects the approach taken by Florida and South Dakota, which are much too broad in their statutory definition of gang members and gang activity. *See supra* notes 195-97 and accompanying text. This definition will help enable the act to survive a constitutional challenge based on overbreadth and freedom of association. *See supra* notes 153-79, 185-95 and accompanying text.

250. Section 1(c) provides:

(i) In any prosecution under this statute, expert testimony is admissible to show conduct, status and customs indicative of criminal street gangs, including, but not limited to:

- (A) Common characteristics of gang members;
- (B) Rivalries between specific gangs;
- (C) Common practices and operations of gangs;
- (D) Social customs and behavior of gang members;
- (E) Terminology used by gang members;
- (F) Codes of conduct, criminal or otherwise, of particular gangs; and
- (G) The types of crimes that a particular gang is likely to commit, or that gangs in general are likely to commit.

(ii) Except when otherwise prohibited by state law, such testimony may be based in whole or in part on inadmissible evidence.

This provision is somewhat similar to Nevada's anti-gang statute. *See* NEV. REV. STAT. § 193.168 (Michie Supp. 1993).

The Model Act allows expert testimony to be based on police reports and other forms of hearsay evidence, unless state law prohibits the use of such evidence as a basis for expert opinion. *See supra* notes 198-201 and accompanying text. Federal Rule of Evidence 703 allows experts to rely on

example, may use such testimony to establish the proportion of criminal activity on the part of a given gang. Criminal street gangs vary tremendously in their characteristics, activities and habits,²⁵¹ and such expert testimony will be useful to the trier of fact in determining whether criminal conduct is a particular gang's primary activity, so as to trigger coverage of the Act.²⁵² The defense, on the other hand, might present expert testimony about the social functions and activities of a gang. Such evidence could rebut evidence for the state that tends to show that the gang's primary activity is criminal conduct.

Section 2 of the Model Act provides sentence enhancements for crimes committed at the direction of, or for the benefit of, the gang.²⁵³ Sentence

inadmissible evidence if the evidence is of a type reasonably relied upon by experts in the field. FED. R. EVID. 703. (Prior to the adoption of the Federal Rules of Evidence, a minority of states allowed this practice with respect to expert testimony. RICHARD O. LEMPERT & STEPHEN A. SALTZBURG, *A MODERN APPROACH TO EVIDENCE: TEXT, PROBLEMS, TRANSCRIPTS AND CASES* 865-66 (2d ed. 1983). It may still be barred in those states that have not since adopted evidence rules based on the Federal Rules.) Inasmuch as gang experts inside and outside of the police force commonly rely on such evidence, it should be allowed to form the basis of an opinion on gang activity and conduct. Police officers would be allowed to testify on these issues so long as they met the relevant state standard for expert testimony. Under the Federal Rules approach, an officer's experience may provide him with the appropriate level of specialized knowledge about gangs to qualify as an expert. *See* FED. R. EVID. 702.

The Model Act, however, would not allow expert testimony on the issue of *defendant's* membership in a given gang, because the use of hearsay in such instances would tend to violate the Confrontation Clause of the Sixth Amendment. (Direct evidence of defendant's gang membership, of course, is not barred by the Model Act.) Expert testimony is allowed here only to establish whether a given gang is involved in criminal conduct as one of its primary activities, so as to trigger coverage of the Model Act.

251. *See supra* notes 66-94 and accompanying text.

252. Expert testimony on terminology used by gang members, *see supra* note 250, may be especially useful to the trier of fact in understanding the evidence and testimony presented by both sides, inasmuch as the gang culture may be largely foreign to the average juror or judge.

253. Section 2(a) provides:

Any person who is convicted of a gang-related felony shall be punished by an additional term of two years. The court may, in its discretion, choose not to impose the additional penalty if the interests of justice so require. The court shall state its reasons for so doing on the record at the time of sentencing.

Section 2(b) provides:

As used in this section, "gang-related felony" means any felony or attempted felony committed with the specific intent:

- (1) to increase a gang's size, membership, prestige, dominance, or control in any geographical area;
- (2) to provide the gang with any advantage in, or any control or dominance over any criminal market sector;
- (3) to exact revenge or retribution for the gang or any member of the gang;
- (4) to obstruct justice, intimidate or eliminate any witness against the gang or any member of the gang; or
- (5) to otherwise promote, further or assist any criminal conduct by gang members.

The definition of "gang-related felony" is similar to a provision in Illinois' Streetgang Terrorism

enhancements in this context punish the particular evil of group, as opposed to individual, crimes and act as a deterrent to gang-related criminal activity.²⁵⁴ Under section 2, these enhancements require specific intent to promote, further, or assist the gang's criminal activity, so as to avoid due process problems.²⁵⁵ The enhancements are mandatory unless the court finds that mitigating factors or the interests of justice require otherwise. By establishing a rebuttable presumption that gang-related activity will be punished more severely, the deterrent value of the enhancements is preserved while still allowing the court to consider mitigating factors.

Section 3 establishes the substantive crime of engaging in criminal street gang activity. This crime is committed by actively participating in a criminal street gang with knowledge that its members are engaged in a pattern of gang activity and willfully promoting, furthering or assisting felonious criminal conduct by members of the gang. Because the definition of criminal street gang under this Act contemplates that the gang's primary activity will be criminal conduct, due process concerns are not implicated here. Indeed, it will be difficult to be part of such a gang without also taking an active role in the commission of crime.²⁵⁶

Section 3 also establishes two other substantive crimes. First, it would be a felony to use or threaten force to induce a minor to actively participate

Omnibus Prevention Act. See ILL. ANN. STAT. ch. 740, para. 147/10 (Smith-Hurd Supp. 1994). It is both specific, to avoid vagueness problems, and broad, to cover the full range of gang-related criminal activity.

254. As the Seventh Circuit observed in upholding the consideration of gang membership as an aggravating factor at sentencing: "Gang membership, insofar as it bears on the issues of rehabilitation and general deterrence, may be a relevant factor in fashioning an appropriate sentence." *United States v. Johnson*, 903 F.2d 1084, 1091 (7th Cir. 1990). In *Johnson*, gang membership was particularly relevant because it involved an attack on a witness at the direction of the El Rukn gang. *Id.* The Supreme Court has held that evidence of gang membership may be presented at sentencing so long as such evidence is relevant to that proceeding. *Dawson v. Delaware*, 112 S. Ct. 1093, 1097 (1992). In *Dawson*, such evidence was held to be irrelevant because there was no connection between the gang and the crime in question. *Id.* at 1097-98. However, as Justice Thomas noted in dissent, gang evidence can show a defendant's tendency to engage in unlawful activity, as well as his future dangerousness, and can rebut a defendant's assertion of good character. *Id.* at 1100-01 (Thomas, J., dissenting).

Sentence enhancements for gang-related crimes codify these arguments. In the absence of such requirements, courts could properly consider gang membership, or whether a crime was committed to benefit a gang, as an aggravating factor in a gang-related crime. Just as states make policy judgments about which crimes are most serious by establishing statutory ranges of sentences, sentence enhancements in this context reflect a determination that organized criminal activity should be punished more severely than individual crime. See *supra* note 95 and accompanying text (gang members more likely to commit violent crimes acting within gang than alone).

255. See *supra* notes 182-84 and accompanying text.

256. See *supra* note 183 and accompanying text.

in a gang.²⁵⁷ Second, the Act would punish as a felony the recruitment of minors through violence, threats of violence, or other solicitations to aid and abet the commission of a predicate crime under the Act.²⁵⁸ Both of these provisions are designed to hamper gang recruiting of children and thus cut off the supply of future members.²⁵⁹ Violation of either of these provisions by a minor would be only a misdemeanor under the Act.

Section 4 of the Act creates strong criminal forfeiture provisions that allow forfeiture of any interest acquired through the direction or management of criminal street gang activity.²⁶⁰ The management requirement is imported from the federal CCE statute.²⁶¹ This requirement only allows forfeiture of an individual's property if that property was acquired as the result of a pattern of criminal street gang activity *and* the individual occupies a position of leader, organizer, supervisor, or other management position within the gang. As with RICO, forfeiture under this section is mandatory upon a conviction of the substantive crime of participation in a criminal street gang, provided that the defendant occupied the requisite leadership position within the gang. These provisions reduce the economic

257. This provision mirrors § 186.26 of the California STEP Act. CAL. PENAL CODE § 186.26 (West Supp. 1994); *see supra* note 135 and accompanying text.

258. The crime in question must be committed for the benefit of or at the direction of the gang. This provision attacks the gangs' practice of using minors, often children as young as nine or ten years old, as lookouts or drug runners, which takes advantage of both the juvenile justice system and a loophole in gang-coercion statutes such as § 186.26 of the California Penal Code. "Because juveniles are rarely imprisoned for any great length of time, they provide a uniquely recyclable labor pool." Lamar, *supra* note 105, at 21. Because these children would not necessarily be actively participating in gang activity under the statutory definition, the provisions criminalizing coercion to participate in a gang, *see supra* note 257, would not be implicated.

Thus, without a prohibition against the use of minors to aid and abet gang activity, gang members could continue to exploit children and the juvenile justice system with impunity. By establishing a disincentive to use this newest form of child labor, an important form of gang recruiting is hampered and fewer children will be adopted into the surrogate family of the street gang. *See supra* note 25 and accompanying text.

259. *See supra* notes 105, 258 and accompanying text.

260. Section 4 provides:

(a) Any person who violates any provision of Section 3 of this Act shall, upon conviction and in addition to any other punishment provided by law, forfeit to the State:

(1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of the criminal street gang activity which provided the basis for the conviction; and

(2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such criminal street gang activity, provided that

(3) said person occupied a position of leader, organizer, a supervisory position, or any other position of management within the criminal street gang.

261. 21 U.S.C. § 848(c) (1988).

incentive to join gangs²⁶² by separating those most responsible for gang activity from their ill-gotten gains. It also enables prosecutors to attack the criminal gang organization itself by removing a source of financing for criminal activity²⁶³ and reducing the individual's economic control over gang activity.²⁶⁴

Section 4 also contains procedural protections for innocent third parties who may be affected by forfeiture. As under RICO, potentially forfeitable property is subject to pretrial injunction in order to preserve its availability until a forfeiture proceeding can take place.²⁶⁵ Under the Model Act, third parties affected by a forfeiture order could challenge the forfeiture at a post-trial hearing. In order to defeat forfeiture of a third-party interest, the challenging party would have the burden of proving by a preponderance of the evidence that they did not know, and had no reason to know, that the property was acquired through criminal street gang activity.²⁶⁶

262. See *supra* notes 80-81, 85, 105 and accompanying text.

263. For example, the tremendous profits gangs receive from the drug trade allows them to obtain sophisticated and deadly weapons, enabling gangs to outgun most police departments. See *supra* notes 102-03 and accompanying text. By requiring gangs to forfeit both their weapons and the criminal proceeds they might use to buy them, these advantages can be significantly reduced.

264. See *supra* note 243 and accompanying text.

265. Section 4(a)(4) provides:

Upon application of the State, the court may enter a restraining order or injunction, or take any other action necessary to preserve the availability of property described in Subsections (1)-(2)

(A) upon the filing of an indictment or information charging a violation of Section 3 of this Act and alleging that property exists which would, in the event of conviction, be forfeitable under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that

- (i) there is a substantial probability that the State will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and
- (ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered.

This section essentially mirrors a similar provision in RICO. See 18 U.S.C. § 1963(d) (1988). For a detailed discussion of the need for pretrial injunctions in the criminal forfeiture arena, see *supra* notes 222-23 and accompanying text.

266. Section 4(a)(5) provides:

All right, title and interest in property described in Section 4(a) vests in the State upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be subject to forfeiture, unless the transferee establishes in a hearing that they did not know, or had no reason to know, that the property in question was acquired as a result of criminal street gang activity.

This section also follows a similar provision in RICO. See 18 U.S.C. § 1963(f)(6) (1988). Much as federal criminal forfeiture law provides an incentive for third parties to take care with respect to the

Although the California legislature removed similar forfeiture provisions from the STEP Act during the legislative process because of concern that innocent third parties would be adversely affected by such provisions,²⁶⁷ this concern was misplaced. Third parties can and must have their interests protected from encroachment by criminal forfeiture procedures. So long as those interests are protected, third parties play an important role by carefully monitoring use of their property and discouraging its use for illegal activity.²⁶⁸ Accordingly, concern about the impact of forfeiture provisions on third parties is best served by strengthening protection for third parties, not by removing forfeiture provisions necessary for a strong anti-gang law. Finally, section 4 allows for confiscation of weapons used by gang members upon a showing by a preponderance of the evidence that the weapons were used in, or acquired through, a pattern of criminal street gang activity.²⁶⁹

States that adopt this or any other specific criminal statute to combat criminal street gang activity must also provide legislation specifically designed to address the causes of gang formation and activity.²⁷⁰ Gangs have been a major presence in America for more than a century²⁷¹ and even if these new laws are successful in eliminating criminal street gangs,

property they lend, purchase, or acquire that it is not used for illegal activity, this provision provides a disincentive for friends and family members to encourage criminal street gang activity by their friends and relatives through sharing in the proceeds of gang-related crime. *See supra* notes 224-27 and accompanying text.

267. *See supra* notes 117-18 and accompanying text.

268. *See supra* notes 224-25 and accompanying text.

269. Section 4(b) provides:

(1) Any firearm, ammunition which may be used with the firearm, or any deadly or dangerous weapon which is owned or possessed by a member of a criminal street gang for the purposes of the commission of any of the offenses listed in Section 1, or is acquired through a pattern of criminal street gang activity or the commission of any of the offenses listed in Section 1, may be confiscated by any law enforcement agency or peace officer.

(2) Any firearm, ammunition or other deadly weapon confiscated under Section 4(b)(1) will be forfeited to the State upon a showing by a preponderance of the evidence that it was, in fact, used in the commission of any of the offenses listed in Section 1, or that it was, in fact, acquired through a pattern of criminal street gang activity. The law enforcement agency seeking to obtain forfeiture shall have the burden of proof at such a hearing.

This provision acts in conjunction with the profit forfeiture sections of the Act to reduce the gangs' weapon superiority over the police. *See supra* notes 103, 264. The weapon forfeiture section eliminates the weapons used for specific gang activity. Section 4(b)(2) eliminates weapons that have been acquired through criminal gang activity, whether or not they were actually used to commit such activity. Section 4(a) in general reduces or eliminates the gang's financial ability to replace weapons forfeited through either section 4(a)(2) or section 4(b).

270. For a discussion of these causes, see *supra* notes 82-89 and accompanying text.

271. *See supra* notes 43-65 and accompanying text.

an alternative to gang life must be provided or the gangs will reappear.²⁷²

VI. CONCLUSION

By refining their statutory approaches to criminal street gangs, states will gain a powerful tool against a sophisticated, well-organized criminal element without unnecessarily infringing upon the constitutional rights of gang members or chilling gangs' legitimate, socially beneficial activities. If states combine strong anti-gang legislation with social programs designed to eliminate the causes of gang activity, America's newest form of organized crime can be substantially reduced or eliminated, and the renaissance of her inner cities may begin.

David R. Truman

272. So-called "gang intervention" programs must be comprehensive in order to be successful, targeting family life, the schools, and the development of job skills and opportunities. Arnold P. Goldstein, *Gang Intervention: A Historical Review*, in THE GANG INTERVENTION HANDBOOK, *supra* note 12, at 21, 37-38. A 1989 report by the California Council on Criminal Justice made a variety of recommendations to address the gang problem. Among its numerous and far-reaching suggestions for anti-gang social programs were to develop job-creating projects in the inner cities; expand testing of primary school children to identify learning disabilities; design and increase afterschool and weekend activities to appeal to teenage students; recruit business and community leaders to serve as role models for youth; enhance parenting skills and increase parental responsibility for children's activities; notify parents when their children are involved in gang activity; and encourage businesses to develop inner-city employment opportunities and training programs. *Id.* at 47-49.

