

SB

194

MEMBER

TENTH ALASKA LEGISLATURE
ELEVENTH ALASKA LEGISLATURE
TWELFTH ALASKA LEGISLATURE
THIRTEENTH ALASKA LEGISLATURE
FOURTEENTH ALASKA LEGISLATURE
FIFTEENTH ALASKA LEGISLATURE
SIXTEENTH ALASKA LEGISLATURE
EIGHTEENTH ALASKA LEGISLATURE
NINETEENTH ALASKA LEGISLATURE

ALASKA STATE SENATE



SENATOR TIM KELLY

STATE CAPITOL
JUNEAU, ALASKA 99801-1182
(907) 465-3822
FAX (907) 465-3758

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1-800-770-3822
(JANUARY 1996 - MAY 1996)
INTERNET: //http://www.state.ak.us/

Sponsor Statement
CCSB 194(JUD)

"An Act relating to offenses associated with criminal street gangs, and to sentencing for those offenses; relating to the offenses of murder in the second degree, an unclassified felony, misconduct involving weapons in the first degree, a class A felony, and misconduct involving weapons in the third degree, a class C felony; and amending Rule 702(a), Alaska Rules of Evidence; and providing for an effective date."

SB 194 was introduced in response to the rapid escalation of violent gang-related crime in Anchorage and throughout Alaska. In 1995, more than four gang-related murders were committed in Anchorage as well as numerous gang-related hold-ups and drive by shootings. Presently there are over 463 identified gang members in Anchorage alone. The central purpose behind the introduction of SB 194 is to give law enforcement and prosecutors the tools necessary to deal effectively with the increased presence of gangs in Alaska. The committee substitute now before you represents consensus language reached after many discussions with the Attorney General's Office.

Specifically, CSSB 194 would:

* Amend the crime of murder in the second degree to include a "felony murder" provision for a death resulting from a drug offense or a gang related shooting. Under current law, if a bystander is shot in a shoot-out between drug-dealers attempting to complete a drug deal or in a crime committed by a gang or gangs, the shooter can claim he was firing in self defense. This provision would eliminate a claim of self-defense when an innocent bystander is injured and would hold drug-dealers and gang members accountable for their violent and dangerous behavior.

* Make it a crime to recruit a gang member if the person uses or threatens to use force against a person or property to induce a person to participate in a criminal street gang or to commit

a crime on behalf of a street gang. This crime would constitute a class C felony. This crime of recruiting would also be extended to recruitment without force by a person 18 years or older who encourages a person under the age of 18 to participate in a gang. Recruitment in the second degree would constitute a class A misdemeanor.

- * Elevates the crime of weapons misconduct--applicable to drive-by shootings-- to a class A felony. (5 to 10 years).

- * Allows for expert testimony relating to criminal street gang activity such that in a criminal prosecution, expert testimony is admissible to show gang affiliation, custom, rivalry, and other characteristics of gangs. This section will give prosecutors the ability to introduce evidence of gang affiliation.

- * Provides for the forfeiture to the state of a motor vehicle, weapon, electronic communication device, or money or other valuables, used in or obtained through an offense that was committed for the benefit of, at the direction of, or in association with a criminal street gang.

- * Allows for gang membership to be considered as an aggravator for sentencing purposes in felonies. Further, SB 194 would elevate misdemeanors committed for the benefit of, at the direction of, or in association with a criminal street gang. For example, a B misdemeanor committed for the benefit of, at the direction of, or in association with a criminal street gang would be elevated to an A misdemeanor. Similarly, a class A misdemeanor would be elevated to a class C felony.

The CS for SB 194 now before this Committee is the result of much negotiation and deliberation between the Attorney General's Office and my office. The CS represents a consensus approach to dealing with the menace of gangs and gang-related violence in Alaska. I ask for your support of this legislation so we can move forward in sending the message that gang violence will not be tolerated in this state.

STATE OFFICE
ALASKA PEACE OFFICERS ASSOCIATION

P.O. Box 240106 Anchorage, Alaska 99524-0106 Phone (907) 277-0515 Fax (907) 272-5355



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Anchorage

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James See, Member
Craig
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March 19, 1996

Senator Tim Kelly
Alaska State Legislature
State Capitol (MS 3100)
Juneau AK 99801-1182

Dear Senator Kelly,

Our organization has over 1,100 Alaska members, representing local, state, and federal agencies. The membership shares a common goal to address issues pertaining to peace officers.

The APOA Board of Directors met recently and discussed the CS for SB 194. The board unanimously decided to endorse this legislation as it applies to offenses associated with street gangs. It is unfortunate that gangs and related problems have increased in some Alaska cities, necessitating legislative action. We feel that the proposed legislation provides a foundation to address these issues.

I encourage you to contact me if you need any further support on this, or any other legislation pertaining to peace officer issues. I can be reached at 451-5316, or through the APOA business manager, Joseph Young, at 277-0515.

Sincerely

Michael Corkill
State President

cc: Senators Pearce, Senate President
 Donley
 Green
 Leman
 Phillips

FISCAL NOTE

STATE OF ALASKA
1996 LEGISLATIVE SESSION

BILL NO: CSSB 194(JUD)

Revision Date: March 18, 1996
 Title: Crimes associated with criminal street gangs
 Sponsor: Senator Kelly
 Requestor: H. Judiciary

Dept. Affected: Public Safety
 BRU: Alaska State Troopers
 Component: Detachments
 COMPONENT SERIAL NO. 0799

EXPENDITURES/REVENUES: (Thousands of Dollars) (inflation not included)

OPERATING	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
CHANGE IN REVENUES () Revenue Code	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program						
1006 GF/MHTIA						
Other						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

Estimate of current year (FY 96) impact: \$ _____

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary.)

This bill will not have a fiscal impact on the Division of Alaska State Troopers.

Prepared By: Lt. Dan Lowden Phone: 465-5505
 Division: Alaska State Troopers Date: March 18, 1996
 Approved by Commissioner: *Dal Smith* Date: 3/19/96
 Agency: Ronald L. Otte, Department of Public Safety

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FISCAL NOTE

STATE OF ALASKA
1996 LEGISLATIVE SESSION

BILL NO. SB 194

Revision Date: _____ Dept. Affected: Department of Law
 Title: "...relating to offenses with criminal street gangs
and the sentences for those offenses." BRU: Criminal Division
 Sponsor: Senator Kelly Component: Criminal Division
 Requester: Senate Judiciary Committee COMPONENT SERIAL NO. 2085

Expenditures/Revenues

(Thousands of Dollars)

OPERATING EXPENDITURES	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
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FUND SOURCE

(Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY96) cost: \$ 0.0

POSITIONS

FULL-TIME	0.0	0.0	0.0	0.0	0.0	0.0
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

This bill criminalizes participation in criminal street gangs. In so doing, the bill establishes several elements that would have to be proved in order to obtain a conviction. For this reason, the Department of Law believes that the bill's requirements are too complicated and provide too many defenses, making prosecution problematic. The bill also has the unintended potential effect of reducing the penalties for some gang related activities, which would otherwise be charged under accomplice liability provisions of current law.

Consequently, there will probably not be many prosecutions under the bill's provisions, if it is enacted. On those few occasions when the provisions are used, prosecution will be difficult and expensive.

Richard I. Pegues

Prepared by: Richard I. Pegues, Director
 Division: Administrative Services Division
 Approved by Commissioner: Bruce M. Botelho, Attorney General
 Agency: Department of Law

Phone: 465-3672
 Date: 1/16/96
 Date: 1/16/96

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FISCAL NOTE

STATE OF ALASKA
1996 LEGISLATIVE SESSION

BILL NO: CSSB 194

Revision Date: February 28, 1996- Dept. Affected: Public Safety
 Title: Crimes associated with criminal street games. BRU: Alaska State Troopers
 Component: Detachments
 Sponsor: Senator Kelly
 Requestor: S. Judiciary COMPONENT SERIAL NO. 0799

EXPENDITURES/REVENUES: (Thousands of Dollars) (inflation not included)

OPERATING	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
CHANGE IN REVENUES ()	-0-	-0-	-0-	-0-	-0-	-0-
Revenue Code						

FUNDING: (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program						
1006 GF/MHTIA						
Other						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

Estimate of current year (FY 96) impact: \$ _____

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary.)

This bill will not have a fiscal impact on the Division of Alaska State Troopers.

Prepared By: Lt. Dan Lowden Phone: 465-5505
 Division: Alaska State Troopers Date: February 28, 1996
 Approved by Commissioner: *Ronald L. Otte* Date: 2/28/96
 Agency: Ronald L. Otte, Department of Public Safety

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Revision Date: _____
 Title: "An Act relating to offenses associated with criminal street gangs..."
 Sponsor: Senator Kelly
 Requestor: (S) Judiciary

Department Affected: Administration
 BRU: Public Defender Agency
 Component: Public Defender Agency
 COMPONENT SERIAL NO. 1631

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING EXPENDITURES	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES	0.0	0.0	0.0	0.0	0.0	0.0
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CHANGE IN REVENUES ()	0.0	0.0	0.0	0.0	0.0	0.0
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FUND SOURCE: (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
OTHER						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY 96) cost: \$ 0.0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary.)

There is no fiscal impact on the Public Defender Agency.

Prepared by: John B. Salemi, Director
 Division: Public Defender Agency

Phone: (907) 264-4412
 Date: _____

Approved by Commissioner: Mark Boyer
 Agency: Department of Administration

Date: 1/16/96

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FISCAL NOTE

No. 2
 Bill Version: CSSR 194(Jud)
 (S) Publish Date: 2/29/96

**STATE OF ALASKA
 1996 LEGISLATIVE SESSION**

Revision Date: _____ Dept. Affected: Department of Law
 Title: "...relating to offenses with criminal street gangs BRU: Criminal Division
and the sentences for those offenses." Component: Criminal Division
 Sponsor: Senator Kelly
 Requester: Senate Judiciary Committee COMPONENT SERIAL NO. 2085

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES						
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY96) cost: \$ 0.0

POSITIONS

FULL-TIME	0.0	0.0	0.0	0.0	0.0	0.0
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

This bill criminalizes participation in criminal street gangs. In so doing, the bill establishes several elements that would have to be proved in order to obtain a conviction. For this reason, the Department of Law believes that the bill's requirements are too complicated and provide too many defenses, making prosecution problematic. The bill also has the unintended potential effect of reducing the penalties for some gang related activities, which would otherwise be charged under accomplice liability provisions of current law.

Consequently, there will probably not be many prosecutions under the bill's provisions, if it is enacted. On those few occasions when the provisions are used, prosecution will be difficult and expensive.

Prepared by: Richard I. Peques, Director Phone: 465-3672
 Division: Administrative Services Division Date: 1/16/96
 Approved by Commissioner: Bruce M. Botelho, Attorney General Date: 1/16/96
 Agency: Department of Law

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STATE OF ALASKA
1996 LEGISLATIVE SESSION

Bill Version: CSSB 194 (Jud)

(S) Publish Date: 2/29/96

Revision Date: _____
Title: An Act Relating to Offenses Associated
with Criminal Street Gangs.
Sponsor: Senator Kelly et al
Requestor: Senate (JUD)

Dept. Affected: Health and Social Services
BRU: Family and Youth Services
Component: DFYS Central Office
COMPONENT SERIAL NO. 259
See also (SN#): _____

Expenditures/Revenues:

(Thousands of Dollars)

OPERATING	FY97	FY98	FY99	FY00	FY01	FY02
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
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CHANGES IN REVENUES ()						
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FUND SOURCE

(Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other (please specify)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of any current year (FY96) cost: \$0.0

ANALYSIS: (Attach a separate page if necessary)

From the limited information available regarding street gangs, the Division cannot accurately assess the impact this bill would have on programs. However, it appears that it will be minimal.

Prepared by: L. Diane Worley
Division: Family & Youth Services

Phone: 465-3191
Date: 01/16/96

Approved by Commissioner: Karen Perdue, Commissioner
Agency: Department of Health & Social Services

Date: 1/15/96

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FISCAL NOTE

Bill Version: CS SB 194 (Jud)

(S) Publish Date: 2/29/96

STATE OF ALASKA
1996 LEGISLATIVE SESSION

Revision Date: _____
Title: "An Act relating to offenses associated with criminal street gangs..."
Sponsor: Senator Kelly
Requestor: (S) Judiciary

Department Affected: Administration
BRU: Public Defender Agency
Component: Public Defender Agency
COMPONENT SERIAL NO. 1631

EXPENDITURES/REVENUES:

(Thousands of Dollars)

OPERATING EXPENDITURES	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES	0.0	0.0	0.0	0.0	0.0	0.0
CHANGE IN REVENUES ()	0.0	0.0	0.0	0.0	0.0	0.0

FUND SOURCE:

(Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
OTHER						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY 96) cost: \$ 0.0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary.)

There is no fiscal impact on the Public Defender Agency.

Prepared by: John B. Salemi, Director
Division: Public Defender Agency

Phone: (907) 264-4412
Date: _____

Approved by Commissioner: Mark Bover
Agency: Department of Administration

Date: 1/16/96

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FISCAL NOTE

Bill Version: CS SB 194 (Jud.)

STATE OF ALASKA
1996 LEGISLATIVE SESSION

(S) Publish Date: 2/29/96

Revision Date: _____
Title: "An Act relating to offenses associated with criminal street gangs..."
Sponsor: Senator Kelly
Requestor: Senate Judiciary

Department Affected: Administration
BRU: Office of Public Advocacy
Component: Office of Public Advocacy

COMPONENT SERIAL NO. 43

EXPENDITURES/REVENUES:

(Thousands of Dollars)

OPERATING EXPENDITURES	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	****	****	****	****	****	****

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
------------------------	--	--	--	--	--	--

FUND SOURCE:

(Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
OTHER						
TOTAL	****	****	****	****	****	****

Estimate of any current year (FY 96) cost: \$ 0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary.)
There will undoubtedly be a fiscal impact to OPA on our criminal section and on our contractors, due to increased arrests and increased criminal litigation. It is not possible at this time to quantify this impact.

Prepared by: Brant McGee, Public Advocate
Division: Office of Public Advocacy

Phone: 274-1684
Date: _____

Approved by Commissioner: Mark Boyer
Agency: Administration

Date: 1/17/96

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STATE OF ALASKA
1996 LEGISLATIVE SESSION

Bill Version: CSSB 194 (Jud)

(S) Publish Date: 2/29/96

Revision Date: February 28, 1996

Dept. Affected: Public Safety

Title: Crimes associated with criminal street gangs

BRU

Alaska State Troopers

Component:

Detachments

Sponsor: Senator Kelly

Requestor: S. Judiciary

COMPONENT SERIAL NO. 0799

EXPENDITURES/REVENUES: (Thousands of Dollars) (inflation not included)

	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
OPERATING						
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
CHANGE IN REVENUES () Revenue Code	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program						
1006 GF/MHTIA						
Other						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

Estimate of current year (FY 96) impact: \$ _____

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary.)

This bill will not have a fiscal impact on the Division of Alaska State Troopers.

Prepared By: Lt Dan Lowden

Phone: 465-5505

Division: Alaska State Troopers

Date: February 28 1996

Approved by Commissioner:

Ronald L. Otte
Ronald L. Otte, Department of Public Safety

Date: 2/25/96

Agency:

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FISCAL NOTE

STATE OF ALASKA
1996 LEGISLATIVE SESSION

BILL NO. SB194

Revision Date: _____
 Title: An Act Relating to Offenses Associated
with Criminal Street Gangs.
 Sponsor: Senator Kelly et al
 Requestor: Senate (JUD)

Dept. Affected: Health and Social Services
 BRU: Family and Youth Services
 Component: DFYS Central Office
 COMPONENT SERIAL NO. 259
 See also (SN#): _____

Expenditures/Revenues:

(Thousands of Dollars)

OPERATING	FY97	FY98	FY99	FY00	FY01	FY02
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
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CHANGES IN REVENUES ()						
-------------------------	--	--	--	--	--	--

FUND SOURCE

(Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other (please specify)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of any current year (FY96) cost: \$0.0

ANALYSIS: (Attach a separate page if necessary)

From the limited information available regarding street gangs, the Division cannot accurately assess the impact this bill would have on programs. However, it appears that it will be minimal.

[Signature]

Prepared by:
 Division:

L. Diane Worley
Family & Youth Services

Phone: 465-3191

Date: 01/16/96

Approved by Commissioner:
 Agency:

Karen Perdue, Commissioner
Department of Health & Social Services

Date: 1/15/96

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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(f)(1) (1986).

226. *Id.* § 1963(f)(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(f)(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 954, 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.

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 & Lindeman, *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.

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).

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 (Cl. 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. Cl. 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. Cl. 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

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

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

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 (Cl. 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 (Cl. 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.

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(e). 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 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. 1993).

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-

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(c). 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 § 186.22(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).



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 333 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).

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 117-111 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.

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

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.

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. Impudently 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

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*, CHIC. 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*, CHIC. TRIB., Dec. 22, 1993, at 3 (Chicagoland); Robert Becker, *Another Rukn Case Figure Gets a Pass*, CHIC. TRIB., Jan. 28, 1994, at 4 (Chicagoland); *Rukn Sentences Cut After Bungled Trial*, CHIC. TRIB., June 11, 1994, at 5; *2 Rukns Sentenced After Plea Bargain*, CHIC. 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*, CHIC. TRIB., June 4, 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*, CHIC. 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").