

## Essay

# THE HOSTAGES IN THE 'HOOD

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The purpose of law is to prevent the strong always having their way.<sup>1</sup>

## INTRODUCTION

The situation in gangland is grim. Violent youth gangs are spreading at an alarming rate from major urban centers into smaller urban, suburban, and rural areas, bringing with them increased drug trafficking, violence and murder. Nine and ten year-old "wannabes" are joining. States with growing gang problems are reacting by passing "gang control" legislation, and local police authorities perceive themselves to be under siege. So desperate is the City of Fort Worth, Texas to "stop the killing" that in early 1994 its city council approved a controversial plan to hire known gang members as street "counselors."<sup>2</sup>

The goal of this essay is to sketch out an approach which attempts to highlight the multiplicity of interests necessarily included in, but not always identified in, debates over gang control policy. The intent is not so much to suggest a way in which to resolve these often competing interests (which would be impossible in any event), or even to attempt an exhaustive discussion of the most important ones. It is, rather, to suggest that a feel for context and a sense of proportion is or ought to be critical in all discussions of gang control policy.

The original version of this essay was designed as a primer for an interdisciplinary audience of academics and professionals with an interest in the civil rights issues which arise when the law attempts to get control of "gangs."<sup>3</sup> As the research proceeded, however, it became increasingly clear that the three

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1. Ovid, *17 Fasti*, c. 8, in *THE QUOTABLE LAWYER* 309 (David Shrager & Elizabeth Frost eds. 1986).

2. Wendy Benjaminson, *Fort Worth's Gang Plan Greeted with Skepticism: Scheme Would Pay Leaders for "Counseling,"* THE HOUSTON CHRONICLE, May 22, 1994, State Sect., at 1.

3. Portions of the material in this article appeared as *Gangs and Civil Rights*, in *GANGS* 277 (Scott Cummings & Daniel J. Monti, eds., 1993).

most common analytical models — a police-community relations approach which highlights the civil rights concerns of inner-city, minority communities, an organized crime model, and a sociological approach — are inadequate for the task facing cities and towns beset by gang activities and violence.

The police-community relations model which animates many recent gang "summits" takes what appears at first glance to be a "civil rights" approach.<sup>4</sup> It assumes that gangs are a constituent part of the communities they inhabit, and views the police as outsiders. An organized crime model, by contrast, views gangs as a cancer in the community, to be eliminated by the judicious use of local, state, and federal law enforcement resources.<sup>5</sup> Like the police-community model, its focus is bipolar ("insiders" vs. "outsiders"), but differs on who the "outsiders" are (i.e. the police or the gangs themselves).

Sociological models describe various aspects of the "gang problem", and are, by their very nature, multi-disciplinary. Since they focus on the social and cultural dynamics of crime in the communities in which gangs are a growing menace, they present not so much a "strategy" for controlling gangs, but a way of defining and understanding both "the problem" itself, and the community in which it exists.<sup>6</sup>

Though a successful gang control strategy will necessarily include aspects of all three traditional approaches, it is obvious from a review of the legal literature that none of them focuses on the interests of those "caught in the crossfire." The police-community relations and organized crime models are too narrow, tending to focus on traditional civil rights and criminal law concerns. The sociological model is too broad. We need another vantage point.

This essay takes the position that the traditional individual rights model is an inadequate conceptual framework for understanding the multiplicity of interests affected by urban and rural street gangs. Given the realities of life, death, and organized lawless behavior in a growing number of urban and rural settings, a more appropriate conceptual framework is to be found in the Fourth Geneva "Convention Relative to the Protection of Civilian Persons in Time of War."

Part I is an exploration of the ways in which gangs are understood by law and sociology, and asks whether the language of individual rights is appropriate given the multiplicity of legitimate interests affected by gang-related criminal behavior. Part II discusses the rights and interests of neighbors caught in the crossfire of gang violence in terms of the Geneva Convention's concern for non-combatants in war zones. Part III is an examination of the treatment of gangs by the criminal law, with particular attention given to the manner in which state and federal responses to the spread of urban gangs departs from the sociological model. Part IV is a discussion of the need for an interdisciplinary approach, not only in law-making, but also in our public discourse about gangs, civil rights, and criminal behavior. The essay concludes with an argument that because the gang "problem" covers such a wide range of immensely

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4. See, e.g., Joseph Keenan, *U.S. Street Gang Summit Ends with Charge of Media Discrimination*, THE REUTER LIBRARY REPORT, May 3, 1993.

5. Wendy Benjaminson, *Fort Worth's Gang Plan Greeted with Skepticism: Scheme Would Pay Leaders for "Counseling"*, THE HOUSTON CHRONICLE, May 22, 1994, State Sect., at 1.

6. *Id.*

controversial criminal, sociological, civil rights, social welfare, and political issues, it is particularly important that gang control policy should have a clear focus, and that it should be, first and foremost, on the interests of the adults and children who have become, quite literally, "the hostages in the 'hood."

## I. GANGS AND CIVIL RIGHTS: IS AN "INDIVIDUAL RIGHTS" PARADIGM APPROPRIATE?

Most discussions of civil rights are bipolar, pitting the interests of a faceless "state" against those of individuals or groups whose identifying racial, ethnic or cultural characteristics, legal status or associational choices are, for largely irrational reasons, disfavored by members of the general public. Most instances of discrimination on the basis of race, religion, and national origin fit neatly into such a framework.

More difficult are issues where government policy lines are drawn ("discriminate") on the basis of factors which are both "rational" and which, upon examination, have some relationship (even if only an assumed one) to the attainment of legitimate public purposes. Criminal laws generally fit into this category. A more precise form of line drawing occurs when legislation targets gangs, their graffiti, symbolic attire ("colors"), personal mobility or associations, or which mandates parental responsibility or various forms of civil forfeiture. Such legislation can be defended (though not always successfully) on rational grounds even though it can have a significant and intended impact on identifiable communities, or on otherwise protected interests such as freedom of expression, privacy, association, or private property. One thing, however, is clear: notwithstanding either the seemingly absolute language of several constitutional provisions,<sup>7</sup> or the rhetoric of many civil libertarians critical of such balancing, there are few, if any, rights which are construed to be absolute in the face of what are perceived to be compelling community needs.<sup>8</sup>

Nowhere is this balancing process beset with more difficulty — and controversy — than in the individual liberty aspects of criminal justice. On one side are clearly legitimate public and private interests in crime prevention, apprehension of criminals, the administration of justice, and penology. On the other are explicit constitutional guarantees designed to protect individuals from state action which classifies citizens on the basis of race or national origin, or which intrudes or interferes in their family relationships, travel, or ability to associate and communicate freely with others. The definition of what constitutes a "gang" is a case in point.

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7. *E.g.*, U.S. CONST. amend. I (1791) ("Congress shall make *no law respecting* an establishment of religion or prohibiting the free *exercise* thereof, or *abridging* the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.") (emphasis added); U.S. CONST. amend. XIV, §1 (1868) ("No State shall make or enforce *any* law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive *any* person of life, liberty, or property without due process of law; nor deny to *any* person within its jurisdiction the equal protection of the laws.") (emphasis added).

8. The Supreme Court of the United States has never construed the First Amendment as broadly as its language appears to allow, much to the chagrin of Justices such as the late Justice Hugo Black who believed that "no" law meant precisely that: *no law*. See LOUIS FISHER, *AMERICAN CONSTITUTIONAL LAW* 83 (2d ed. 1994).

### A. What Is a Gang?

The term "gang" is notoriously imprecise, but there is no question that it has a generally pejorative connotation. Whatever a "gang" does, the common understanding of the concept is that it is unsavory. The term itself, however, potentially describes a multitude of groups, from the Democratic or Republican Parties (especially in convention), and fraternal organizations whose funny hats and other regalia trumpet their group identity, to unruly groups of fraternity pranksters out to have a little, not-always-inexpensive "fun" at someone else's expense, business associates who make and execute plans to fix or manipulate commodity prices, and labor unions which have occasionally been known to utilize unsavory means to accomplish otherwise legitimate goals.<sup>9</sup>

While it may be unwise for the authorities to ignore anti-social and sometimes illegal behavior by any of these groups, it happens more often than the authorities are likely to admit. The reason is rarely stated explicitly, but it is safe to assume that the nature of the group in question or the behavior involved leads law enforcement authorities to conclude (validly or not) either that there is no continuing threat to public safety, or that prosecution would simply not be worth the cost.

Social concern about "gangs" appears to center on those groups a lay person might describe as *real* criminals. Among these are the gangs about which we are concerned here; from the street toughs who mug and rob passers by on a regular basis, to integrated criminal enterprises whose reach extends even into the prisons, such as the Mafia, the Crips and Bloods, the Jamaican Posses, and the Tong. The public is scared. In the words of the California State Task Force on Gangs and Drugs: "Some communities are literally held captive by the violence, intimidation and decay."<sup>10</sup>

The practical problem for lawyers may, as a result, be summarized as follows: even though all groups which can be characterized as "gangs" share a common characteristic, joint action for a common purpose, the concern of "gang control" laws cannot really be either group identity or joint action *per se* for too many legitimate associations would be caught in the net. The problem appears to be various types of behavior which, because of their nature or extent, are so antisocial that a collective purpose to engage in them is simply intolerable.

So it is important at the outset to be clear about what is at stake when recommendations for laws and policies designed to address the "gang problem" are drafted. When an association of individuals is formed for non-criminal purposes (e.g., social, economic or fraternal), rules governing associational activity should be scrutinized by the courts to determine the nature of the

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9. See, LA. REV. STAT. ANN. § 15:1406 (West 1993) ("This Chapter does not apply to employees engaged in collective bargaining activities for their mutual aid and protection, or the activities of labor organizations or their members or agents."); GA. CODE ANN. 16-15-6 (1993) (same); MO. REV. STAT. § 578. 427 (1993) (same).

10. CALIFORNIA COUNCIL ON CRIMINAL JUSTICE, STATE TASK FORCE ON GANGS AND DRUGS, *Final Report* (January 1989) at 16 (hereafter, CALIFORNIA TASK FORCE ON GANGS AND DRUGS REPORT).

group's activity and what, if any, legitimate governmental interests justify regulating it.<sup>11</sup>

When the common purpose of any group or association, whether termed a "gang" or something else, is illegal however, the law has a legitimate right to take whatever steps are appropriate to control the illegal behavior.<sup>12</sup> Where the government wants to go further: to regulate the non-criminal activities of the members of the group or their eligibility for public employment or housing benefits, for example, the burden on the government increases. It must produce evidence sufficient to stand up in court<sup>13</sup> that those to be singled out for special treatment because of membership in an illegal group (1) are active members of the illegal organization; (2) know of the illegal aims or activities; (3) have a specific intent to carry out or further the gang's illegal purposes; and (4) engage in activities or associate with a criminal enterprise that is incompatible with the legitimate purpose of the program in question.<sup>14</sup>

The regulatory process begins with a definition of the "problem". The California State Task Force on Youth Gang Violence, for example, has found that "[a] uniform definition of gangs is needed"<sup>15</sup> because "valid data collection is unavailable and interagency cooperation is hindered" without one.<sup>16</sup> "For consistency," it suggested that the following clarification of the term "gang" be used "as the uniform statewide definition of youth and adult gangs in California:"<sup>17</sup>

A gang is a group of people who interact at a high rate among themselves to the exclusion of other groups, have a group name, claim a neighborhood or other territory and engage in criminal and other anti-social behavior on a regular basis.<sup>18</sup>

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11. See, e.g., *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) (commercial associations); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (familial relationships); *NAACP v. Button*, 371 U.S. 415 (1963) (professional relationships for the advancement of a political and social agenda).

12. In *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), which involved the Jaycees' refusal to admit women members, the Supreme Court held that the state may even intervene in the membership selection decisions of associations which have as one of their major goals "expressive" activity; that is, activity which merits First Amendment protection. Such intervention may take place, however, only when there is a "compelling state interest of the highest order" and the regulation is the least restrictive means of attaining the government's purpose. Where the activity the state seeks to regulate is illegal — in *Roberts* discrimination on the basis of sex was prohibited — it is arguable that the state has already met its burden of proof. See, e.g., *Employment Div., Or. Dept. of Human Res. v. Smith*, 494 U.S. 87 (1990); *National Org. for Women v. Scheidler*, 114 S. Ct. 798 (1994).

13. Cf. *Brandenberg v. Ohio*, 395 U.S. 444 (1969); *Dennis v. United States*, 341 U.S. 494 (1951); *Schenk v. United States*, 249 U.S. 47 (1919). See generally JOHN E. NOWAK ET AL., *Constitutional Law* §§ 16.40-16.44 at 946-65 (3d ed., 1986) (freedom of association and non-association).

14. Cf. *United States v. Robel*, 389 U.S. 258 (1967). Compare text at note 77 *infra*.

15. CALIFORNIA COUNCIL ON CRIMINAL JUSTICE, STATE TASK FORCE ON YOUTH GANG VIOLENCE, *Final Report* (State of California: Sacramento, January, 1986) at 8. (Finding 1).

16. *Id.*

17. *Id.*

18. *Id.* at 9.

As useful as this definition might be in developing a "statewide gang information system,"<sup>19</sup> it captures only a part of the problem for law enforcement purposes. While the groups most often thought of as "gangs" generally operate on the fringes of society ("interstitially" in Thrasher's definition<sup>20</sup>), and the criminal or anti-social behaviors with which society is concerned may cluster demographically on the margins, neither the occurrence of gangs nor criminal behavior are limited to that demographic region.<sup>21</sup> The law's legitimate concern is any sort of collective or group-directed illegal activity, whether on the streets of a neighborhood, in the cell-blocks of prisons, in the sales territories of the international drug marketplace, or in the corporate boardroom.<sup>22</sup>

By the same reasoning, not all groups which "interact at a high rate among themselves to the exclusion of other groups, have a group name, [and] claim a neighborhood or other territory" are actual or even potential criminals, even if they do engage in "anti-social behavior on a regular basis."<sup>23</sup> "Anti-social" is not the same as "criminal."<sup>24</sup> As Dolan and Finney note: "Most social gangs aren't looking for trouble when they first take shape. The trouble erupts when one or more of their social activities starts to get out of hand."<sup>25</sup>

In legal parlance, sociological definitions of the term "gang" tend to be both over-inclusive ("overbroad") and under-inclusive (discriminatory). Thus, if sociologically useful definitions are adopted for criminal law purposes, they are in danger of being held unconstitutional because, in plain English, they are not specific enough.

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19. *Id.* at 9 (Finding 2). Section 13825 of the California Penal Code, adopted in 1988 and repealed by its own terms in 1991, required the State Office of Criminal Justice Planning to produce a "study regarding the implementation of a computerized data base information system to monitor gang violence and drug trafficking activities, as these relative to gang violence in California" by July 1, 1990. Among the items to be examined were: "[t]he guidelines to be required to ensure that the data base is uniform" and "[t]he type of safeguards to be used to ensure that the personal privacy rights of the subject of the information are not violated[, and] [w]hether or not additional safeguards are needed to ensure that only information relating to criminal activity is placed in the system." CAL. PENAL CODE §§13825(a)(4), (7), (8) (West 1991) (repealed January 1, 1991 by its own terms).

20. See FREDRIC MILTON THRASHER, *THE GANG*, 46 (J.F. Short, Jr. abr. ed., 1963).

21. See, e.g., C. Scattarella, *Gangs Exploding The Myth — Losing Children to Gangs Is Not a Problem for Just Uncaring or Poor Families: A Loving Upbringing May Not Be Enough Protection*, THE SEATTLE TIMES, October 28, 1990, at A1; T. Daunt, *Gangs in Suburbia: Thousand Oaks: With a Low Crime Rate and High Average Income, the City Seems an Unlikely Place for Youth Gangs Such as the Houston Hoods*, L.A. TIMES, September 16, 1990 (Ventura County ed.) Metro at B1, col. 2.; *Crime and Gangs are Cropping Up in Small Cities*, All Things Considered, Nov. 17, 1993 available in LEXIS, NEXIS library, NPR file (noting that Little Rock, Arkansas, has one of the most serious gang problems for its size, in the country).

22. See, e.g., *National Org. for Women v. Scheidler*, 114 S. Ct., 798 (1994); *Abell v. Potomac Ins. Co.*, 858 F.2d 1104 (5th Cir. 1988) (RICO applied to claim of federal securities fraud); *Perez v. Paine Webber Jackson & Curtis, Inc.*, 960 F.2d 534 (5th Cir. 1992).

23. CALIFORNIA TASK FORCE ON YOUTH GANG VIOLENCE, *Final Report*, *supra* note 15 at 9.

24. See EDWARD F. DOLAN & SHAN FINNEY, *YOUTH GANGS*, chs. 3, 6 (1984); MICHAEL D. LYMAN, *GANGLAND*, at 15-17 (Charles Thomas, Springfield, Ill. 1989) (discussing the definition of the term "organized crime"); *id.* at 95-96 (discussing the definition of the term "youth gang"); Thrasher, *supra*, note 20, Chs. 4 - 9.

25. DOLAN & FINNEY, *supra* note 24, at 51.

The courts do not look kindly upon criminal statutes which utilize broad language to describe the activities to be prohibited; for, by definition, the enforcement of criminal laws will adversely affect the lives, liberties or property<sup>26</sup> of the individuals or groups to which they are applied. Notwithstanding their utility for other purposes (such as data-gathering), the adoption of broad statutory definitions of criminal behavior may result in a judicial determination that, for constitutional purposes, they are "vague, indefinite and uncertain."<sup>27</sup> Such ambiguities render the statute "vague and overbroad" in legal parlance, and violate the most basic precepts of due process of law.<sup>28</sup> For nearly identical reasons, statutory ambiguities are resolved in favor of lenity.<sup>29</sup>

The practical result is that any definition of "gang" which is to be useful for legal purposes must be keyed both to the specifics of the criminal code and to empirically verifiable patterns of gang conduct. That such a limiting definition is necessary as a matter of constitutional law was underscored by a unanimous, eight-member, United States Supreme Court in *Lanzetta v. New Jersey*.<sup>30</sup> *Lanzetta*, decided in 1939, involved a 1934 New Jersey statute which provided that:

Any person not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons, who has been convicted at least three times of being a disorderly person, or who has been convicted of any crime in this or in any other State, is declared to be a gangster...provided, however, that nothing in this section contained shall in any wise be construed to include any participant or sympathizer in any labor dispute.<sup>31</sup>

Mr. Lanzetta and his co-defendants were convicted and sentenced under this statute to the state prison for five to ten years at hard labor. Their crime was "being a 'gangster'."<sup>32</sup> For them, the question "who is a 'gangster' (i.e. a 'gang' member)?" was more than an interesting sociological question; it meant the difference between freedom and imprisonment.

After canvassing several dictionary definitions and the work of Herbert Asbury and Frederic Thrasher,<sup>33</sup> *Lanzetta's* conviction was reversed because "[i]t is the [statute's definition of the offense — "being a gangster"], not the accusation under it, that prescribes the rule to govern conduct and warns

26. U.S. CONST. amends. V, XIV §1. For the text of the Fourteenth Amendment, see note 7.

27. *Garner v. Louisiana*, 368 U.S. 157, 162 (1961).

28. *See Lanzetta v. New Jersey*, 306 U.S. 451, 458 (1939), *infra* notes 30 to 36 and accompanying text.

29. *See, e.g., Liparota v. United States*, 471 U.S. 419 (1985) (prosecution for illegal possession of food stamps); *United States v. Nofziger*, 878 F.2d 442 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1003 (1989) (prosecution of former Presidential adviser under The Ethics in Government Act).

30. 306 U.S. 451 (1939) (Justice Frankfurter did not participate).

31. *Id.* at 452 (*quoting* 1934 N.J. Laws §4, ch. 155).

32. Every violation of the statute was punishable by fine not exceeding \$10,000 or imprisonment not exceeding 20 years, or both. 1934 N.J. Laws § 5.

33. *Id.* at 454-55 nn.3-5.

against transgression.”<sup>34</sup> A clear definition of what behavior is to be criminalized is needed:

That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.<sup>35</sup>

The logic of the Court's decision is apparent when one looks critically at the separate elements of the “offense” of being a gangster under the statute in question. Any person:

- Not engaged in any lawful occupation,
- Known to be a member of any gang consisting of two or more persons; and
- Having at least three convictions of being a disorderly person, or conviction of any crime in New Jersey or in any other State

was declared to be a “gangster.” But one could certainly be engaged in the types of criminal activities with which New Jersey was then apparently concerned — that is, one could behave like a “gangster”, but not be one for criminal law purposes. All that was necessary to escape was (1) lawful employment (as an attorney, for instance), (2) secret association and cooperation with a gang of organized criminals, and (3) a clean criminal record to date. Thus, all one had to do was have a decent job, be discreet, and, above all, not get caught.

By the same token, one could legally be a gangster under New Jersey's law, yet not currently be engaged in any criminal activity. In effect, one would be penalized for being an unemployed person with a criminal record who hangs around with a “known” group of friends. Clearly, the New Jersey statute at issue in *Lanzetta* was over-inclusive, under-inclusive, vague (“known”? by whom?) and ambiguous.<sup>36</sup>

*Lanzetta* bears witness to the constitutional difficulties which will arise when legislatures attempt to criminalize a sociological concept (“gangs”) rather than human behavior. If there is a conclusion that can be drawn from *Lanzetta*, it is that social science definitions and legal definitions cannot always be the same. Definitions which are useful for descriptive social science purposes may, for precisely the same reasons, be unconstitutional as legal ones. The question which remains to be examined is whether legislative drafters and gang “task forces” have learned much since *Lanzetta*. The answer depends, in part, on how one reads *Lanzetta* itself.

But before we turn to the question of how recent legislation defines “gangs” and “gang-related activity”, it will be necessary to consider the impact of these organizations on the neighborhoods in which they operate.

34. *Id.* at 453 (citing *Stromberg v. California*, 283 U.S. 359, 368 (1931); *Lovell v. Griffin*, 303 U.S. 444 (1938)).

35. *Id.* (quoting *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926)).

36. Compare cases cited *supra* note 29.



***B. Striking an Appropriate Balance Among the Interests of "Society", the Individual, and Innocent Third-Parties***

When homes, jobs, businesses and neighborhoods (including those which lie within the walls of a prison or jail) lie within the territory of a "gang", or when the organization, secrecy and group cohesiveness of a gang complicates the already-difficult task of law enforcement or penal officials, there is more involved than just the legally enforceable liberty interests of gang members. In both of these settings one must also take into account the liberty and equality interests of ordinary citizens and prisoners who wish to have no dealings with gang members. Those caught in the crossfire have at least the same rights to privacy and liberty as do gang members. They too have the right to be free of threats, regardless of their source, to the emotional and physical well-being of themselves, their families, and the integrity of their homes. Even convicted felons have a significant interest in serving their sentences without fear that they will be killed or maimed as a result of gang violence in prison.

Since bipolar models of civil rights and criminal procedure law do not generally take into account the interests of either crime victims or the impact of crime on the community as a whole, we cannot begin to formulate a clearly articulated gang-control policy without first taking a more comprehensive look at the needs of communities caught in the crossfire. Given the realities of daily life in neighborhoods where gang violence has made residents virtual prisoners in their own homes, it is not surprising that the Rev. Jesse Jackson told a reporter in late 1993 that he was "rather convinced that the premier civil rights issue of this day is youth violence in general and black-on-black crime in particular."<sup>37</sup> But what model of "civil rights" is broad enough to accommodate such a viewpoint?<sup>38</sup> The Fourth Geneva Convention provides a useful point of departure.

## **II. NEIGHBORS CAUGHT IN THE CROSSFIRE OF GANG VIOLENCE: THE ANALOGY TO THE GENEVA CONVENTION'S TREATMENT OF NON-COMBATANTS**

In any rights-based framework for analyzing governmental approaches to criminal conduct, the role of third-party "victim" or "innocent bystander" interests requires careful consideration. On a normative level, the manner in which individual and group interests are identified and named is an accurate reflection of the character of a society's values. At a functional level, the interests of third parties provide the rationale that legitimizes the criminalization of certain behaviors.<sup>39</sup> Amorphous concepts like "human

37. Michael Rezendes, *Jackson's New Target: Black-on-Black Crime*, BOSTON GLOBE, Nov. 6, 1993, Third ed., National/Foreign Section, at 1.

38. The story in the BOSTON GLOBE went on to discuss the relationship between traditional, "outward-looking" civil rights strategies, and long-standing arguments concerning self-help within minority communities. The point here is that all parts of an urban or rural community are part of the "community." *Id.* The "civil rights" and "self-help" strategies are, as the remainder of this essay makes clear, essential components of an integrated strategy for returning control of the streets to the law abiding citizens who live there. Standing alone, however, they will not be sufficient to protect the citizenry against an armed and dangerous foe, a point underscored by Rev. Jackson's call for a return to basic "values" in schools and churches. *Id.*

39. Such a rationale is, at a minimum, required as the root consideration of due process.

dignity" are given legal substance through the adoption of laws and procedures designed to protect individuals and groups from anti-social behavior.<sup>40</sup>

In the context of gang violence, the plight of the innocent bystander "held captive by the violence, intimidation and decay"<sup>41</sup> is analogous to that of the non-combatant civilian in a war zone. They are, quite literally, "caught in the crossfire." With this analogy in mind, the civilian protection mechanisms developed by the international community emerge as a useful model for identifying what might be termed the "civil rights" of innocent bystanders. The Fourth Geneva Convention ("Geneva IV"), entitled "Convention Relative to the Protection of Civilian Persons in Time of War"<sup>42</sup> provides a useful backdrop against which to view the rights of innocent citizens caught in the crossfire of gang violence. Concepts drawn from the larger notion of international "customary law" are also useful as support for domestic policy initiatives.<sup>43</sup>

Article 3 of Geneva IV applies to "case[s] of armed conflict not of an international character," and sets forth the basic standards by which to judge the human rights records of those involved in armed combat.<sup>44</sup> Because its purpose is to eliminate violence toward, and other degrading treatment of, those not

40. "Human dignity," as a self-contained concept, defies easy definition. The concept derives the most meaning from contextual application. "[T]he effects which flow from an actual implementation of respect for each person...come closest to an initial meaning." Jordan J. Paust, *Human Dignity as a Constitutional Right: A Jurisprudentially Based Inquiry into Criteria and Content*, 27 HOW. L. J. 145, 147 (1984).

41. CALIFORNIA TASK FORCE ON YOUTH GANG VIOLENCE, *Final Report supra* note 10, at 16.

42. Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3364, 75 U.N.T.S. 287 [hereinafter Geneva IV].

43. "Customary law" refers to the notion that the "customs and usages of civilized nations" have long been used as a source of international law binding upon all nations "where there is no treaty, and no controlling executive or legislative or judicial decision...." *American Baptist Churches in the U.S.A. v. Meese*, 712 F. Supp. 756, 770 (N.D. Cal. 1989) *quoting* *The Paquete Habana*, 175 U.S. 677, 702 (1900)). Although Geneva IV generally applies by its terms only to combatants in full-blown international conflict, see *Echeverria-Hernandez v. U.S.* I.N.S., 923 F.2d 688, 693 (9th Cir. 1991), Geneva IV draws from customary law. Theodor Meron, *Geneva Conventions as Customary Law*, 81 AM. J. INT'L L. 348-49 & n.4. "[I]n numerous countries where customary law is treated as the law of the land, but an act of the legislature is required to transform treaties into internal law, the question [of the Geneva Conventions as customary law] assumes importance as if no such law has been enacted." *Id.* at 348. Accordingly, there is support for the proposition that, as a reflection of customary law, Geneva IV, to which the United States is a party, "is part of the common law of the United States." *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 810 (D.C. Cir. 1984) (Bork, J., concurring) (calling the "proposition unexceptionable").

44. Geneva IV, *supra* note 42, art. 3. Article 3 provides, in relevant part:

(1) Persons taking no active part in the hostilities, including members of the armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other criteria.

To this end, the following acts shall be prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment or torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;

...  
(2) The wounded and sick shall be collected and cared for.

engaged in combat, Article 3 applies not only to civilian non-combatants, but also to combatants who are wounded or "lay down their arms."<sup>45</sup>

The application of Geneva IV to gangs and the violence spawned by their activity presents a wide range of questions which are beyond the scope of this essay, but which nevertheless warrant mention here. At the most immediate level, the Geneva IV language applies with particular force to the plight of former gang members. Once such an individual "lays down his colors," he or she stands on equal footing with the non-combatant, and should be free from reprisals for former gang membership. Revenge killings, however, are quite common.<sup>46</sup>

At a more substantive level, recent and highly-publicized "gang summits," complete with press conferences, appearances and speeches by locally and nationally known political figures, raise difficult, and troubling questions. Taken together with the emergence of "negotiations" with police officials concerning "community" concerns, these developments raise disturbing questions concerning the degree to which present day "gangsters" are supplanting legitimate civilian authority in the neighborhoods they claim as their own.<sup>47</sup> The comments of Chicago Aldermen Toni Preckwinkle and Virgil Jones after the October 1993, Chicago "Gang Summit" provide a useful contrast. Alderman Preckwinkle complained:

My constituents are disturbed by all of it. ...They're disturbed not only about the rising political influence of the gangs and the efforts by some politicians and groups to use them, but also by the process that seeks to legitimize them, to create role models. That cuts across all groups in the black community.<sup>48</sup>

Alderman Jones, who is described by the Chicago Tribune as "one of the politicians courting gang-connected groups,"<sup>49</sup> noted that: "In the '60's I recall that Dr. Martin Luther King had the assistance of street groups to draw attention to some of the problems that existed in Chicago. So if it's wrong what I'm doing, then it was wrong what he was doing."<sup>50</sup>

The reaction of public officials was, apparently, guarded given what the Chicago Tribune called "a new reality" for both white and black political

45. *Id.*

46. The first news conference of the October, 1993 National Gang Peace Summit "included a prayer from Wallace 'Gator' Bradley, confidant of [Illinois'] most powerful gang leader." George Papajohn and John Kass, *Gang Summit Nets One Goal Press, TV*, CHICAGO TRIBUNE, Oct. 22, 1993, Section 2, Chicagoland at 1. It began with a few lines of the Lord's Prayer and then veered into new territory as he prayed over the 'non-violent movement.' He ended:

Father, I ask of you that all those nay-sayers, all those agent provocateurs, all those who will stand in the way of this peace, I ask that you blind them, snap the limbs in their bodies, and wipe them from the face of the Earth. Amen."

*Id.*

47. For purposes of comparison, it might be useful to envision the political and moral questions which might arise were the press to give extensive coverage to a "summit" of Mafia crime "families" attended by national civil rights leaders and local politicians.

48. George Papajohn and John Kass, *Gang Summit Nets One Goal Press, TV*, CHICAGO TRIBUNE, Oct. 22, 1993, Section 2, Chicagoland at 7.

49. *Id.*

50. *Id.*

leaders. Cook County State's Attorney, Jack O'Malley, reportedly "express[ed] suspicion about the summit and scoffe[d] at the gang truce, [but] took pains not to insult PUSH or the NAACP"<sup>51</sup> leaders who were in attendance.

Such developments, as well as the rapid spread of gangs and their violent activities into smaller cities, towns and rural areas,<sup>52</sup> underscore the need to focus on the interests of those caught in the crossfire. Geneva IV contains a laundry list of "rules" that suggest civilian human-rights-as-customary-law entitlements during times of war. It provides for: the establishment of hospital, safety,<sup>53</sup> and "neutralized zones intended to shelter from the effects of war;"<sup>54</sup> care for the sick and wounded, with particularized attention for children and expectant mothers;<sup>55</sup> evacuation mechanisms;<sup>56</sup> the protection of hospitals and medical services;<sup>57</sup> and services for reuniting dispersed families.<sup>58</sup> It further imposes penalties for intimidation, terrorism, looting and pillage, and reprisals against persons and property.<sup>59</sup>

The existence of such rules in the analogous setting of a combat zone suggest a workable basis from which to make the case for the existence of both state and gang-member obligations to third parties, and to fit those obligations into traditional "bipolar" civil rights analysis.<sup>60</sup> The analogy to non-belligerent rights, especially if they are viewed as nonderogable, requires us to consider, not only the rights of gang members, but also the larger notion of "human rights" as applied to those affected by their activities.

In fact, the internal law of the United States and the several states does provide remedies for violations of rights, and such remedies are available in appropriate cases both to those alleged to have committed crimes and to their victims.<sup>61</sup> All are equal (theoretically) before the law, and the case reports are

51. *Id.*

52. *See supra* note 21.

53. Geneva IV, *supra* note 42, at art. 14.

54. *Id.* at art. 15.

55. *Id.* at art. 16.

56. *Id.* at arts. 17, 24.

57. *Id.* at arts. 17-23.

58. *Id.* at art. 26.

59. *Id.* at arts. 33-34.

60. Theodor Meron proposes a "Humanitarian Declaration on Internal Strife" which would implement Geneva IV-type human rights:

The declaration should...be based on the following principles: (1) it should concern internal, not international strife; (2) it should cover situations involving collective violence, including low-intensity violence, ranging "from simple internal tensions to more serious internal disturbance;" (3) it should cover situations not already covered by humanitarian law; and (4) it should be nonderogable and not subject to any limitations or restrictions for any reason whatsoever.

Theodor Meron, *Editorial Comment: Towards a Humanitarian Declaration on Internal Strife*, 78 AM. J. INT'L. L. 859, 861 (1984). Unlike a treaty, however,

[t]he declaration should contain a provision stating that its application shall not affect the legal status of authorities or persons involved in the situation of internal strife. Such a provision is necessary to encourage governments to respect the declaration without fear that its application might amount to recognition of, or grant of political status to, dissidents or other oppositional elements.

*Id.* at 864.

61. A number of States have adopted laws addressing the rights of crime victims and mandating the compensation of victims of crime. *See, e.g.*, ALA. CODE §§ 15-18-65, 15-18-67 (1993); ALASKA STAT. §§ 12.61.010, 18.67.010 (1994); CAL. GOV. CODE § 13959 (West

filled with state and federal cases filed by convicted criminals seeking protection of their rights. Unfortunately for crime victims, most violent criminals are judgment-proof, and prisons are already grossly overcrowded.

The point here is a simple one. The civil and criminal justice systems do, at least in theory, provide complimentary and cumulative protection for the civil rights of all citizens, including those caught in the crossfire. It is time to take the rights of the innocents in our own cities as seriously as we do the rights of those caught in the crossfire in places like Beirut, Sarajevo, and Belfast. The first step is a refusal to concede that our domestic gangsters are the legitimate political representatives of any cause. To make that concession, whether out of desperation or a misguided sense that gang membership is necessarily related to social deprivation,<sup>62</sup> is to invite anarchy. -

### III. GANGS AND THE CRIMINAL LAW

#### A. *Current Approaches: California's STEP Act, RICO and the Continuing Criminal Enterprise*

If one assumes that it is possible to translate a sociological concept as amorphous as "gang" into a criminal statute specific enough to pass constitutional muster, the task after *Lanzetta* is not to give up on punishing membership in gangs, but to be more specific about what the government intends to accomplish by getting gangs "under control."

The two most important pieces of legislation currently on the books and directed toward that end are California's Street Terrorism Enforcement and Prevention Act [STEP Act]<sup>63</sup>, and the federal Racketeer Influenced and Corrupt Organizations Act [RICO].<sup>64</sup> Both are designed to enhance the penalties provided by existing law for collective criminal conduct.<sup>65</sup>

Another useful descriptive device is the concept of the "continuing criminal enterprise" adopted in the Comprehensive Drug Abuse Prevention and Control Act of 1970.<sup>66</sup> The Act imposes severe penalties on the head of such an enterprise<sup>67</sup> and enhances otherwise available penalties accordingly.<sup>68</sup>

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1993); COLO. REV. STAT. § 24-4.2-105 (1993). *But cf.*, Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board, 502 U.S. 105 (1991).

62. Compare Daniel J. Monti, WANNABE: GANGS IN SUBURBS AND SCHOOLS 137-150 (1994).

63. CAL. PENAL CODE §§ 186.20 - 186.28 (West Supp. 1994).

64. 18 U.S.C. §§ 1961-1968. It also bears noting here that several states have followed the Congressional lead, and have enacted state laws closely patterned after RICO. Discussion of their specific characteristics and provisions is beyond the scope of this essay. *See, e.g.*, COLO. REV. STAT. §§ 18-17-101 — 109 (1993); FLA. STAT. ANN. §§ 895.01-895.09 (West Supp. 1994); GA. CODE ANN. §§16-14-1, 16-14-15 (1990); ILL. REV. STAT. ch. 56 1/2, para. 1651-1660 (1994) (narcotics racketeering); IND. CODE §§ 35-45-6-1 — 2 (1994); LA. REV. STATS. ANN. §§ 15:1351 - 15:1356 (West 1992); MISS. CODE ANN. §§ 97-43-1 — 97-43-11 (1993); WIS. STAT. §§ 946.80 — 946.88 (1993); ORE. REV. STAT. §§ 166.715 - 166.735 (1993); PA. CORRUPT ORGS. ACT., 18 PA. CONS. STAT. § 911-946.88 (1993).

65. See also CAL. PENAL CODE § 12021.5 (West 1992) (adds a two year term to sentence in street gang convictions where a loaded or unloaded firearm is carried on the person or in a vehicle).

66. PUB. L. 91-513, 84 STAT. 1236, 1265 (1970).

67. 21 U.S.C. § 848(b)(1) (1994) (life sentence under certain circumstances).

68. See *infra* text accompanying notes 92-96.

None of these statutes, however, define "gang" in accordance with the desire of the California State Task Force on Youth Gang Violence for a "uniform statewide definition of youth and adult gangs."<sup>69</sup> Given the nature of the term, the quest for a uniform definition will inevitably be met with frustration in the context of criminal law. Nonetheless, the necessary conceptual compromises are minor, basically exchanging flexibility and certainty for uniformity. That this is an improvement over the definition in *Lanzetta* is obvious. More importantly, it keeps the focus of the law on a legitimate target: criminal behavior.

### 1. California's Approach: The STEP Act

California's STEP Act defines a "criminal street gang" as "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 [following] criminal acts . . .":<sup>70</sup>

Assault with a deadly weapon or by means of force likely to produce great bodily injury...robbery...homicide or manslaughter,...drug trafficking, shooting at an inhabited dwelling or occupied motor vehicle, ...arson, witness intimidation...or grand theft of any vehicle, trailer or vessel....<sup>71</sup>

In addition, it must be found that the group has "a common name or common identifying sign or symbol," and that its "members individually or collectively engage in or have engaged in a pattern of criminal gang activity."<sup>72</sup>

For purposes of the statute a "pattern of criminal gang activity" is defined as

the commission, attempted commission, or solicitation of two or more of the [above-listed] offenses, provided that at least one of those offenses occurred after the effective date of [STEP Act], that the last of those offenses occurred within three years after a prior offense, and that the offenses are committed on separate occasions, or by two or more persons....<sup>73</sup>

Persons subject to prosecution for gang violence under the STEP Act are those who are known members of gangs with a prior criminal background, and where "gang-related means that the suspect or victim of the crime is a known member of a gang."<sup>74</sup>

In the few cases decided to date, the California courts have been strict in their insistence that the statute be strictly construed against the State.<sup>75</sup> In *In re Leland D.*, for example, the Third District Court of Appeal held that:

69. See *supra* note 10.

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

71. CAL. PENAL CODE §§ 186.21(e)(1-8) (West Supp. 1989). Section 186.22(e)(1-7), operative January 1, 1993, omits grand theft of vehicles, trailers and vessels.

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

73. CAL. PENAL CODE § 186.22 (e) (West Supp. 1989).

74. *Id.* at §§ 13826.3(a) & (b) (West Supp. 1989).

75. See *In re Lincoln J.*, 223 Cal. App. 3d 322 (Cal. App. 2 Dist., 1990) (juvenile proceeding; insufficient evidence to find criminal street gang involvement); *In re Leland D.*, 223

The elements of the offense of participation in a criminal street gang are: (1) the existence of a "criminal street gang"; (2) defendant's "active" participation in that gang; (3) defendant's knowledge that "its members engage in or have engaged in a pattern of criminal gang activity"; and (4) defendant's willful promotion, furtherance, or assistance "in any felonious criminal conduct by members of that gang."<sup>76</sup>

The California response to the overbreadth problem identified in *Lanzetta*, therefore, is to define narrowly "criminal gang behavior",<sup>77</sup> and leave the task of defining the term "gang" to the sociologists.<sup>78</sup>

## 2. The Federal Approach: RICO and the "Continuing Criminal Enterprise"

### a. RICO: The Racketeer Influenced and Corrupt Organizations Act

Because state laws are inadequate for the task of controlling the highly sophisticated multi-state criminal enterprises engaged in drug-trafficking and other forms of organized crime or criminal gang behavior, Congress enacted the Racketeer Influenced and Corrupt Organizations Act,<sup>79</sup> usually known as RICO, as Title IX of the Organized Crime Control Act of 1970.<sup>80</sup> It is not

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Cal. App. 3d 251 (Cal. App. 5th Dist., 1990) (same; insufficient evidence that gang to which juvenile allegedly belonged was engaged in "pattern of criminal gang activity" within meaning of the STEP Act). Compare *People v. Superior Court (Robert L.)*, 213 Cal. App. 3d 54 (Cal. App. 2 Dist., 1989) (mandating a reconsideration of a juvenile court's refusal to transfer a minor for trial for murder as an adult in a "drive by" shooting case where evidence of gang involvement was strong).

76. *In re Leland D.*, 223 Cal. App. 3d 251, 327, 272 Cal. Rptr. 709, 854 (1990).

77. See, e.g., *In re Nathaniel C.*, 228 Cal. App. 3d 990, 279 Cal. Rptr. 236 (Cal. App. 1 Dist., 1991); *In re Jose T.*, 230 Cal. App. 3d 1455 (Cal. App. 2 Dist., 1991); *People v. Green*, 227 Cal. App. 3d 692 (Cal. App. 1 Dist., 1991); *In re Alberto R.*, 235 Cal. App. 3d 1309 (Cal. App. 4 Dist., 1991).

*In re Nathaniel C.* is significant for several reasons. First, it construes the term "pattern of criminal gang activity" as "a pattern [which] can be established by two or more incidents, each with a single perpetrator, or by a single incident with multiple participants committing one or more of the specified offenses." *In re Nathaniel C.*, 228 Cal. App. 3d at 1003. Second, the court holds that the requirement can be met by competent proof that members of the gang "individually or collectively engage in or have engaged in criminal gang activity" as defined in the statute, rather than a more difficult showing that the pattern be shown by instances of "purposeful gang activity." *Id.* This is so, said the court, because "[i]ntragang violence threatens public order and safety much the same as criminal conduct directed specifically against persons outside the gang." *Id.* And finally, the court found that nonspecific hearsay evidence produced by expert witnesses (here a policeman who specialized in gang surveillance) is insufficient to support an enhancement under Section 186.22(b).

78. Of the five states which now have gang control legislation on the books, only Florida has attempted to track broadly both sociological and criminal law concerns in its definition of what it means to be a "gang" or a "gang member." This may be attributable in part to Florida's decision to provide for both statewide data-gathering and reporting, FLA. STAT. ANN. § 874.09 (West Supp. 1994), and for the creation of a statewide program of delinquency and gang prevention. FLA. STAT. ANN. § 39.025 (West Supp. 1994). In both cases, a firm empirical basis would be quite useful. As a result, the definition adopted in the Florida statute comes closest to that which was recommended by the CALIFORNIA TASK FORCE ON YOUTH GANG VIOLENCE REPORT, *supra* note 10. The result is that the legislature's concern for the collection of useful sociological data are reflected in the definitions of the terms "youth and street gang" and "youth and street gang member," and its criminal law concerns by the definition of "pattern of youth and street gang activity."

79. 18 U.S.C. §§ 1961-1968 (1988).

80. Pub. L. 91-452, 84 Stat. 941 (1970).

limited in its coverage to what is commonly considered "organized crime". and may be used against any group or association of individuals who engage in the requisite predicate acts, such as street or prison gangs.<sup>81</sup> RICO has been used successfully in New York, for example, against a number of gangs, including the Chinese street gang known as the "Ghost Shadows"<sup>82</sup> and the Hell's Kitchen murder-for-hire gang, "The Westies."<sup>83</sup>

RICO provides substantial criminal and civil penalties for engaging in a "pattern of racketeering activity" within a ten year period.<sup>84</sup> It defines such a pattern in a manner similar to, but broader than, the STEP Act: "any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing with the obscene matter, or dealing with a narcotic or other dangerous drug, which is chargeable under State law and punishable by imprisonment for more than one year."<sup>85</sup> The final "catch-all" provision, which includes all state offenses punishable by imprisonment for more than one year, is particularly sweeping because of the sheer number of crimes which fit this description.

In addition to its broad sweep, it is particularly relevant to note for present purposes Congress' mandate that RICO be "liberally construed to effectuate its remedial purposes."<sup>86</sup> Taking Congress at its word, the courts have allowed a very expansive reading of the statute, resulting in a large number of indictments and convictions for a wide range of activities ranging from street gang activity to federal securities fraud.<sup>87</sup>

One of the most effective aspects of RICO is its provision for civil remedies, including injunctions, treble damages, divestiture of illegally gained property,<sup>88</sup> and attorney fee awards brought in the name of either the United States or "[a]ny person injured in his business or property."<sup>89</sup> The breadth of

81. See *United States v. Turkette*, 452 U.S. 576 (1981); *United States v. Contreras*, 755 F.2d 733 (9th Cir. 1985).

82. See *United States v. Tom*, 787 F.2d 65 (2d Cir. 1986); *United States v. Yin*, 625 F. Supp. 1327 (S.D.N.Y. 1985). See also *United States v. Williams-Davis*, 821 F. Supp. 727 (D.C. Cir. 1993) (Washington D.C.'s "R Street Organization"); *United States v. Burnside*, 824 F. Supp. 1215 (N.D. Ill. 1993) (Chicago's "El Rukns").

83. *United States v. Coonan*, 839 F.2d 886 (2d Cir. 1988). See also *United States v. Andrews*, 824 F. Supp. 1273 (N.D. Ill. 1993) (Chicago's "El Rukns").

84. 18 U.S.C. §1961(5). See *H.J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989) ("pattern" requirement mandates showing both a relationship and a continuity among the predicate acts); *United States v. Brennan*, 629 F. Supp. 283 (E.D.N.Y. 1986).

85. 18 U.S.C. §1961 (1994).

86. Section 904(a), Pub. L. 91-452, 84 Stat. 941, 947 (1970). See *Reves v. Ernst & Young*, 113 S. Ct. 1163, 1172 (1993) ("RICO's liberal construction clause...seeks to ensure that Congress' intent is not frustrated by an overly narrow reading of the statute, but it is not an invitation to apply RICO to new purposes that Congress never intended. Nor does the clause help us to determine what purposes Congress had in mind.").

87. See, e.g., *United States v. Salerno*, 481 U.S. 739 (1987) (Mafia); *Abell v. Potomac Ins. Co.*, 858 F.2d 1104 (5th Cir. 1988) (RICO applied to claim of federal securities fraud); *United States v. Ferguson*, 758 F.2d 843 (2d Cir. 1985), cert. denied 474 U.S. 841 (1985) (Black Liberation Army; armed robbery); *United States v. Bagaric*, 706 F.2d 42 (2d Cir. 1983), cert. den. sub nom; *Lagarusic v. United States*, 464 U.S. 840 (1983) (Croatian terrorists; bombings); *United States v. Amato*, 15 F.3d 230 (2d Cir. 1994).

88. See, e.g., *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989) (divestiture of funds as affecting defendant's ability to employ counsel; Sixth Amendment); *Alexander v. United States*, 113 S. Ct. 2766 (1993); *State ex rel. Thornburg v. House & Lot Located at 532 B Street, Bridgeton*, 432 S.E.2d 684 (N.C. 1993).

89. See 18 U.S.C. § 1964(c) (1988).



the statute, coupled with the courts' liberal construction, are the aspects of the statute which have engendered considerable critical commentary.<sup>90</sup>

#### b. The "Continuing Criminal Enterprise"

The Comprehensive Drug Abuse Prevention and Control Act of 1970<sup>91</sup> is another of the federal government's attempts to provide prosecutors with the tools they need to attack organized criminal behavior by singling out the heads of a "continuing criminal enterprise"<sup>92</sup> for severe punishment. According to the statute:

[A] person is engaged in a continuing criminal enterprise if —

(1) he violates any provision of [the Act] the punishment for which is a felony, and

(2) such violation is a part of a continuing series of [narcotics trafficking] violations

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.<sup>93</sup>

Like RICO and California's STEP Act, the pattern is to define the "enterprise" in terms of the commission of specified criminal acts which are committed in cooperation with a specified number of persons, here five. The STEP Act, by contrast, requires only three persons to constitute a "criminal street gang",<sup>94</sup> and RICO, the broadest of all, defines "enterprise" to include "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."<sup>95</sup> Other relevant statutes focus on the circumstances surrounding the events leading up to the conviction, and increase punishment for specific types of conduct such as the use or concealment of a weapon in the course of a crime.<sup>96</sup>

90. See generally Gerald E. Lynch, *RICO: The Crime of Being a Criminal, Parts I & II*, 87 COLUM. L. REV. 661 (1987), *Parts III & IV*, 87 COLUM. L. REV. 920 (1987); Michael Goldsmith, *RICO and Enterprise Criminality: A Response to Gerard E. Lynch*, 88 COLUM. L. REV. 774 (1988); David W. Gartenstein and Joseph F. Warganz, Note: *RICO's "Pattern" Requirement: Void for Vagueness?*, 90 COLUM. L. REV. 489 (1990); M. Headley, Comment: *Sedima v. IMREX: Civil Immunity for Unprosecuted RICO Violators?*, 85 COLUM. L. REV. 419 (1985). The United States Supreme Court recently held that RICO can apply to enterprises when the alleged "racketeering activity" had a political or social, but not a commercial, dimension. *National Org. for Women v. Scheidler*, 114 S. Ct. 798 (1994). The question left for remand in *Scheidler* is the definition of "extortion" in the non-commercial context.

91. The Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. 91-513, 84 Stat. 1236, 1265 (1970).

92. 21 U.S.C. § 848(a)(1) (1994).

93. 21 U.S.C. § 848(c) (1994).

94. CAL. PENAL CODE § 186.22(f) (West supp. 1994).

95. 18 U.S.C. § 1961(4) (1988).

96. See, e.g., CAL. PENAL CODE § 12021.5 (West 1992) (adding a two year term to sentence in street gang convictions where a loaded or unloaded firearm is carried on the person or in a vehicle, but giving the judge discretion to vary the term by one year for aggravating and mitigating circumstances); N.C. GEN. STAT. § 14-34.1 (1993) (firing a firearm into occupied property as aggravating factor when determining sentence); Violent Crime Control and Law

***B. Following the California and Federal Examples: The Emerging Contours of State Criminal and Civil Law Response***

In addition to California, twelve states have enacted legislation which deal specifically with the problem of gang violence: Alabama,<sup>97</sup> Arizona,<sup>98</sup> Colorado,<sup>99</sup> Florida,<sup>100</sup> Georgia,<sup>101</sup> Illinois,<sup>102</sup> Indiana,<sup>103</sup> Iowa,<sup>104</sup> Louisiana,<sup>105</sup> Missouri,<sup>106</sup> South Dakota,<sup>107</sup> and Washington.<sup>108</sup> A review of the LEXIS State Bill Tracking Service in October 1994 revealed that legislation was currently pending or recently adopted in thirty-three states.<sup>109</sup>

Louisiana and Florida have followed California's approach. Both recite that, while desirous of protecting freedom of expression, association and belief, each State also considers itself to be in a "mounting crisis caused by youth and street gangs whose members threaten, and terrorize peaceful citizens."<sup>110</sup> Indiana and Arizona have taken a less elaborate approach, amending their respective criminal codes to reflect their growing concerns with the special problems associated with gangs.

***1. Defining the Nature of a Gang: State Variants***

The variations among the State law definitions of the concept of a "gang" provide some interesting insights into the way in which individual States view the youth gang phenomenon. In Florida, South Dakota, Missouri, and Iowa, for example, a "youth and street gang" is defined as,

a formal or informal ongoing organization, association, or group of three or more persons who: (a) have a common name or common identifying signs, colors, or symbols; and (b) have members or associates who, individually or collectively, engage in or have engaged in a pattern of youth and street gang activity."<sup>111</sup>

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property as aggravating factor when determining sentence); Violent Crime Control and Law Enforcement Act of 1994, §§ 60013 - 60018, PUB. LAW 103-322, 108 STAT. 1796 (1994).

97. ALA. PUB. ACT 99, 1994 ALA. H.J.R. 109 (1994) (extending life of youth gang violence commission and increasing its membership).

98. ARIZ. REV. STAT. ANN. § 13-1202 (1993), as amended.

99. COLO. REV. STAT. ANN. § 17-1-109 (West Cum. Supp. 1993) as amended.

100. The Street Terrorism Enforcement and Prevention Act of 1990, FLA. STAT. ANN. §§ 874.01-874.09 (West Supp. 1991).

101. GA. CODE ANN. § 16-15-6 (1993).

102. ILL. COMP. STAT. ch. 127, § 55a; ch. 388 §§ 9-1, 1005-6-3 (1993).

103. The Criminal Gang Control Act, IND. CODE ANN. § 35-45-9-1 (Burns Supp. 1991) (effective July 1, 1991).

104. IOWA CODE § 723A Criminal Street Gangs (1993).

105. The Louisiana Street Terrorism Enforcement and Prevention Act, LA. REV. STAT. ANN. §§ 15:1400-1406 (West Supp 1991).

106. MO. REV. STAT. §§ 578.423 — 578.437 (1993).

107. S.D. CODIFIED LAWS ANN. §§ 22-10-14 — 22-10-16 (1994).

108. WASH. REV. CODE §§ 43.310.005 — .040 (1994); § 13.40.310 (1993).

109. See, e.g., Hawaii: 1993 House Bill 148; Florida: 1994 House Bill 601, 1993 House Bill 75-B; Iowa: 1994 Senate Bill 2319; Massachusetts: 1994 House Bill 1857; Wisconsin: 1993 Assembly Bill 560, 1993 Assembly Bill 861, 1993 Senate Bill 548.

110. FLA. STAT. ANN. §§ 874.02(1)–(3) (1993). See LA. REV. STAT. ANN. § 15:1402(a) (West 1993).

111. FLA. STAT. ANN. § 874.03(a); S.D. COD. LAWS § 22-10-14 (1); MO. REV. STAT. § 578.421(1) (1993); IOWA CODE § 723A.1 (2) (1993).

A "youth and street gang member" is a person who engages in a pattern of youth and street gang activity and meets two or more of the following criteria:

- (a) Admits to gang membership.
- (b) Is a youth under the age of 21 years who is identified as a gang member by a parent or guardian.
- (c) Is identified as a gang member by a documented reliable informant.
- (d) Resides in or frequents a particular gang's area and adopts their style of dress, their use of hand signs, or their tattoos, and associates with known gang members.
- (e) Is identified as a 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 gang members for offenses which are consistent with usual gang activity.
- (g) Is identified as a gang member by physical evidence such as photographs or other documentation.
- (h) Has been stopped in the company of known gang members four or more times."<sup>112</sup>

The Louisiana definition of "criminal street gang"<sup>113</sup> is virtually identical to that of California.<sup>114</sup> Arizona and Indiana, by contrast, do not seem to make any substantive distinction between the behaviors of "youth gangs" and other criminal syndicates or organizations. The Indiana definition of a "criminal gang"<sup>115</sup> would certainly include, among others, what is commonly referred to as "the Mafia" (La Cosa Nostra), whereas Arizona simply defines a "criminal street gang" to be a "criminal syndicate"<sup>116</sup> with three or more persons and a more limited repertoire of criminal offenses than is usually the case in such statutes.<sup>117</sup>

112. FLA. STAT. ANN. §§ 874.03(b); S.D. COD. LAWS § 22-10-14 (2).

113. LA. STAT. ANN. § 15:1404(a) (West 1993) ("any ongoing organization, association, or group of three or more persons, whether formal or informal, which has as one of its primary activities the commissions of one or more of the [enumerated] criminal acts .. or 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.").

114. See *supra* notes 70 - 72 and accompanying text.

115. See IND. CODE ANN. § 35-45-9-1 (1994):

As used in this chapter, "criminal gang" means a group with at least five (5) members that specifically:

1) Either

(A) Promotes, sponsors, or assists in; or

(B) Participates in; and

2) Requires as a condition of membership or continued membership; the commission of a felony or an act that would be a felony if committed by an adult or the offense of battery.

116. ARIZ. REV. STAT. ANN. §13-2301(C)(2) (1994) (defining "criminal syndicate") ("Criminal syndicate" means any combination of persons or enterprises engaging, or having the purpose of engaging, on a continuing basis in conduct which violates any one or more provisions of any felony statute of this state").

117. *Id.* at §13-2301(A)(2) (1994) (defining "criminal street gang") ("Criminal street gang" means a criminal syndicate which is composed of three or more persons and which engages in or has as its purpose engaging in felony offenses included in chapter 34 of this title

Such variations are informative because they provide important insights into the problems gang-control legislation is designed to address. To the extent that a legislature perceives the "gang problem" as a sociological phenomenon having roots in the pathologies of urban street life, the legislation will reflect that orientation.<sup>118</sup> Where legislatures, such as Arizona's, view "gangs" as simply one more form of organized crime, there is no need to address the peculiar demographics and behaviors commonly associated with youth gangs. In this view, crime is crime.

## 2. Defining the Nature of Gang Activity: Variations

The definition of "gang activity" is perhaps the clearest indication of the nature of gang-related criminal activity which besets a particular state. The California, Louisiana, and Missouri definitions contain a list of specific felonies.<sup>119</sup> Arizona limits the reach of its definition of "gang" to offenses involving controlled substances "or felony offenses involving physical injury or threats of physical injury,"<sup>120</sup> and subsumes its rules in more general provisions regulating organized crime and fraud.<sup>121</sup>

Indiana, Iowa and Florida, however, take a far broader approach. Indiana includes all felonies, acts that would be felonies if committed by an adult, and the offense of battery in its definition of "criminal gang", but limits the scope of the definition by providing that, in order to be considered a gang, a group must "[r]equire...as a condition of membership or continued membership" the commission of any of the covered offenses.<sup>122</sup> Iowa defines "a pattern of criminal gang activity" as "the commission, attempt to commit, conspiring to commit, or solicitation of two or more criminal acts, provided the criminal acts were committed on separate dates or by two or more persons who are members of, or belong to, the same criminal street gang."<sup>123</sup> In keeping with its desire to collect and disseminate data on both the criminal and

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[controlled substances] or felony offenses involving physical injury or threats of physical injury.").

118. Compare sources cited *supra* note 21 (noting the spread of gang activity and violence from large cities into both rural and smaller urban areas of the country).

119. See *supra* notes 70 - 72 and accompanying text where offenses listed in the California statute are set forth. In Louisiana, the list includes: (1) aggravated battery or second degree battery; (2) armed robbery; (3) first or second degree murder or manslaughter; (4) sale, possession for sale, transportation, manufacture, offer for sale, or offer to manufacture controlled substances; (5) illegal use of weapons or dangerous instrumentalities; (6) aggravated arson; (7) intimidating, impeding, or injuring witnesses; or injuring officers; and (8) theft of any vehicle, trailer, or vessel. See LA. REV. STAT. ANN. § 15:1404(b)(1-8) (West 1993). In Missouri, the list contains: 1) assault with a deadly weapon or by means of force likely to cause serious physical injury; 2) robbery, arson and those offenses under chapter 569, R.S. Mo., which are related to robbery and arson; 3) murder or manslaughter; 4) any violation of chapter 195, R.S. Mo., which involves the distribution, delivery or manufacture of a substance prohibited by chapter 195; 5) unlawful use of a weapon which is a felony pursuant to section 571.030; 6) tampering with witnesses and victims, as provided in section 575.270, R.S. Mo. See MO. REV. STAT. 578.421 (1993).

120. ARIZ. REV. STAT. ANN. §13-2301(A)(2) (1991).

121. *Id.* at §13-1202 (1991) ("A person commits threatening or intimidating if such person with the intent to terrify threatens or intimidates by word or conduct....To cause physical injury to another person or serious damage to property of another in order to promote, further or assist in the interests of a criminal street gang, a criminal syndicate or a racketeering enterprise.").

122. IND. CODE ANN. § 35-45-9-1(2) (Burns Supp. 1991).

123. IOWA CODE § 723 (A)(3) (1993).

sociological aspects of youth gang behavior,<sup>124</sup> Florida's definition is the broadest of all:

"Pattern of youth and street gang activity" means the commission, attempted commission, or solicitation, by any member or members of a youth and street gang, of two or more felony or violent misdemeanor offenses on separate occasions within a 3-year period, for the purpose of furthering gang activity.<sup>125</sup>

Variations such as these demonstrate that while a number of states agree that youth gang violence and crime are important problems, they have not reached a consensus on how to interpret the crime statistics which motivate the passage of gang-control legislation. Given the complexity of the issues involved, it is unlikely that they ever will. What is plain, however, is that experimentation in states and localities is a welcome development. Law enforcement agencies, social science researchers, and social service institutions have much to learn from the "gang control" approaches taken in cities and states around the country and elsewhere. What they need, however, is a common point-of-reference: a common language to describe the purposes of their efforts.

#### IV. THE NEED FOR AN INTERDISCIPLINARY APPROACH

We are now at the stage where it is appropriate to ask whether the traditional models — police-community relations, organized crime, and sociological — provide enough perspective on the problem of gangs, communities, and criminal behavior to serve as the foundation for the formulation of gang control policies which are both realistic about the nature of the problem and sensitive to legitimate community concerns. Since the multifaceted nature of gangs and their activities makes it imperative that policy be sensitive to the entire range of issues, the individual rights paradigm of the police-community relations and criminal models will certainly be insufficient; for they tend to subsume collective, "community," or societal concerns under the rubric of the civil rights catch-all category known as the "compelling state interest."<sup>126</sup>

With respect to criminal gangs specifically, the propensity to equate the interests of the innocent bystander or witness with the relatively amorphous concept of "state interests" does not do justice to the interests of individuals who are affected personally by gang activity. If, however, the problem is considered in light of Geneva IV's concern for the interests of non-combatants, it should be immediately apparent that each of the three "traditional" approaches addresses an important aspect of gang culture and activity, but is fundamentally incomplete standing alone. An interdisciplinary approach which concedes the legitimacy of each set of concerns is needed.

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124. See *supra* note 78.

125. FLA. STAT. § 874.03(3) (1993).

126. This is an unfortunate tendency in any event. Though the concept is extremely important in constitutional law, see, e.g., *Oregon v. Smith*, 494 U.S. 874 (1990), it is largely undefined. See also, Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential, but Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. REV. 917 (1988); Richard H. Fallon, Jr., *Symposium: Individual Rights and the Powers of Government*, 27 GA. L. REV. 343 (Winter 1993).

### A. *Drawing Insights from the Sociological Approach*

Because sociologists endeavor to understand and describe the dynamics of social groupings, their research provides the backdrop against which the data and experience drawn from other relevant fields, including crime prevention and civil rights law can and should be considered. Perhaps the easiest way to illustrate the process is to utilize a standard sociological definition of "gang", such as that suggested by the California Task Force on Youth Gang Violence,<sup>127</sup> as the basis from which to extrapolate the legal issues which should be considered in the formulation of a coherent gang control policy.

The elements of the definition have been set out in tabular form below, arrayed together with some of the most critical legal issues to which they relate.

A GANG IS A GROUP OF PEOPLE	RELATED LEGAL ISSUES
1. Who interact at a high rate among themselves.	a) freedom of association — to "belong" to the group b) freedom of travel ("territorial" questions, including the legality of curfews) c) freedom to assemble peaceably as a group d) rights of associational privacy, including the right not to belong to the group
2. Which excludes other groups.	a) exclusivity of private or "fraternal" organizations b) self-definition c) non-discrimination on the basis of race, national origin and culture
3. Which has a group name.	a) self-identification b) communication of group identity via graffiti and other means such as uniforms & distinctive clothing
4) Which claims a neighborhood or other territory.	a) travel restrictions as conditions of parole or probation b) threats to the physical well-being of neighborhood residents, and restrictions on their freedom of movement c) graffiti control; rights of private and public property owners
5. And which engages in criminal and other anti-social behavior on a regular basis.	a) utilizing "organized crime" statutes to control the activities and members of gangs b) utilizing sociological, racial, cultural or political data as factors which mitigate or explain criminal behavior c) utilizing present or past gang members in law enforcement or liaison capacities

### B. *Distinguishing Criminal, Civil and Third-Party Rights*

The term "civil rights", properly understood, encompasses a wide range of topics touching on individual and collective political, liberty and "human rights" interests. For purposes of this essay, the term does not include the rights of individuals generally associated with the administration of criminal justice,

127. See *supra* note 18 and accompanying text.

such as the right to counsel,<sup>128</sup> warrant requirements and associated limitations on state investigative, search and seizure powers,<sup>129</sup> jury trial,<sup>130</sup> confrontation of witnesses<sup>131</sup> and other important constitutional guarantees specifically designed to protect individuals who have become the targets of criminal investigations or charges.<sup>132</sup> For present purposes, the focus will be upon the interests that all law-abiding persons (including gang members) have in the preservation of bodily integrity, personal, commercial and neighborhood security, private and public association for a common purpose, freedom to communicate and to travel freely, and freedom from discrimination on the basis of race and national origin.

I place interests in bodily integrity and security of home and work first because I believe that the most basic claim of right an individual can make against society is to have protection for self and family from intimidation and harm.<sup>133</sup> Nevertheless, it is precisely these basic interests which are far too often the missing variable in "rights" discussions in the field of criminal law.<sup>134</sup>

That this is the least obvious inquiry to many, if not most, students of constitutional law rests upon a number of factors. Part of the explanation is the bipolar nature of most civil rights discussions and the individual rights ethos of contemporary constitutional law. Another reason is specific to the nature of criminal law. In the words of David Luban, "the goal...in criminal defense is to curtail the power of the state over its citizens. We want to handicap the state in its power even legitimately to punish us," even if the result is that justice is not served in an individual case. The goal is political: "'impeding justice in the name of more fundamental political ends, namely keeping the government's hands off people.'"<sup>135</sup>

This is certainly a laudable political goal as a matter of general political theory, but in the present context it misses the point that people truly are being held hostage, if not worse, when their homes, businesses and neighborhoods are beset by gang violence. Stories of innocent victims hit by stray bullets because

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128. U.S. CONST. amend. VI.

129. U.S. CONST. amend. IV.

130. U.S. CONST. amends. VI, VII.

131. U.S. CONST. amend. VI.

132. E.g., U.S. CONST. amend. V (double jeopardy, self-incrimination, indictment by Grand Jury, due process of law); U.S. CONST. amend. VI (compulsory process, venue, notice of charges); U.S. Const. amend. VII (no re-examination of facts found by jury); U.S. Const. amend. VIII (excessive bail). While these too are important interests, and each, like its civil counterparts, rests upon not only the written guarantees of constitutional and statutory law, but also upon "natural law," a structure of judicial decisions, and administrative guidelines, policies regulations and practices, any substantive discussion of these topics would go far beyond the scope of this essay.

133. John Locke's *Second Essay Concerning the True Original Extent and End of Civil Government* points out that "the preservation of the society and (as far as will consist with the public good) of every person in it" is "the first and fundamental natural law which is to govern even the Legislative, itself." JOHN LOCKE, *Second Essay Concerning the True Original Extent and End of Civil Government* in TWO TREATISES OF GOVERNMENT 134, 212-220 (Peter Laslett, ed., 1960).

134. The Supreme Court was, at first, hostile to "victim impact" testimony, but has since reconsidered its position. Compare *Payne v. Tennessee*, 501 U.S. 808 (1991) (overruling *South Carolina v. Gathers*, 490 U.S. 805 (1989)), with *Booth v. Maryland*, 482 U.S. 469 (1987).

135. T.L. SHAFFER, *AMERICAN LEGAL ETHICS: TEXT, READINGS, AND DISCUSSION TOPICS* 180-82 (1985) (quoting THE GOOD LAWYER 83-127 (David Luban ed., 1983)).

they were in the wrong place at the wrong time are not uncommon.<sup>136</sup> In this regard, the first finding of the California State Task Force on Gangs and Drugs bears repeating: "Some communities are literally held captive by the violence, intimidation and decay resulting from drug-trafficking by gangs."<sup>137</sup>

Since law and politics are supposed to reflect a balancing of individual and community interests,<sup>138</sup> and the losses which crime victims suffer are not irrelevant either to the definition of the offense or the degree of punishment,<sup>139</sup> both criminal and civil law must take into account the particularly dangerous nature of the gang problem. RICO and the STEP Act, however imperfect the drafting might be, are good examples of legislation which attempts to meet that need.

United States Supreme Court Justice Antonin Scalia's dissenting observation on behalf of four members of the Court in *Booth v. Maryland*<sup>140</sup> captures the essence of the problem which arises when the interests of society-in-the-abstract are "balanced" against the interests of a real defendant:

Many citizens have found one-sided and hence unjust the criminal trial in which a parade of witnesses comes forth to testify to the pressures beyond normal human experience that drove the defendant to commit his crime, with no one to lay before the sentencing authority the full reality of human suffering the defendant has produced — which (and not moral guilt alone) is one of the reasons society deems his act worthy of the prescribed penalty.

For those whose lives are affected by the violence, fear and uncertainty for the security of house, goods and (most importantly) self and posterity, the most important role of the state is to "insure domestic tranquillity" through the operation and enforcement of the criminal and civil sanctions designed to promote order and regularity in community life. This is indeed one of their "civil" rights; the ordinary citizen has nowhere else to turn.<sup>141</sup>

The next inquiry, into the civil rights of gangs and their members, is both more specific and more familiar to those acquainted with civil rights discussions, but it is nevertheless difficult because it involves an overt balancing of individual and associational interests against the individual and collective

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136. See, e.g., M. Copeland, *Colors Held Hostage: Gangs Have Usurped the Color Spectrum. Now How You Mix Colors Could Be a Matter of Life or Death*, CHICAGO TRIBUNE, Sept. 5, 1990, Style at 16; (noting that "When Angel Agosto took a shortcut home last summer he had no idea he was in the wrong place at the wrong time and wearing the wrong colors."); J.W. Fountain, *Gunfire Taking Deadly Toll on Children*, CHICAGO TRIBUNE, September 5, 1990, Chicagoland at 1; (recounting the death of 6-month-old Rashonda Flowers by a stray bullet).

137. CALIFORNIA TASK FORCE ON GANGS AND DRUGS REPORT, *supra*, note 10.

138. The language of the federal constitution itself recognizes that these interests are held in tension, and are to be balanced so as to "establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our posterity." U.S. CONST., pmbl.

139. *Payne v. Tennessee*, 501 U.S. 808 (1991).

140. 482 U.S. 496, 519-20 (1987) (Scalia, J., joined by Rehnquist, C.J., White, J., and O'Connor, J., dissenting).

141. See *Rivera v. United Auto Workers Local 179 UAW-CIO Bldg. Corp.* 266 Cal. Rptr. 262 (1990) (ordered not published, Cal. Rules of Ct. 976) (denying tort cause of action based on failure to provide adequate protection for visitors against owner of building in gang-infested area who rented the building for a party unrelated to its business).



of individual and associational interests against the individual and collective security interests of those who live and work in a community in which a gang and its members operate.

This observation is equally true as applied to the manner in which provisions of gang-control policy are scrutinized. To the extent that only the text of a gang-control law is examined, it is quite likely that few constitutional violations will be found, but the ones which are found may be significant enough to invalidate the policy without requiring evidence of how it works in practice. If, however, the focus turns to the broadest, and perhaps the most pertinent point of reference, the manner in which such laws are applied in the day-to-day workings of the myriad subunits and employees of the local, state and federal governments, the potential for finding violations increases exponentially as a function of the number of persons having operational responsibility. This is so because sensitivity to the civil rights concerns of individuals and communities is not so much a function of positive law (though that helps too) as it is a state of mind which requires respect for one's social and civic duty. Since government employees, from social workers to the State's Attorney, are the most common point of contact between the citizen and the government, we must look to their activity (or neglect) to find the most intractable problems.

### *C. The Need to Consider "Specific" Civil Rights Issues*

#### *1. Freedom of Communication, Assembly and Association*

In relevant part, the First Amendment to the Constitution of the United States provides that: "Congress shall make no law ... abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble."<sup>142</sup> Its relevance lies in its express protection of speech, press and assembly, as well as the right of freedom of association, which has been implied from its terms. Not only are gangs as free as anyone else to assemble "peaceably", they are also free, subject to the rights of property owners and others, to hang signs announcing the existence of their group, to wear distinctive clothing which identifies them as members of a gang, and to associate with one another as much or as little as they please.

Problems arise when the gang has an established record of criminal activity. Just what can the authorities, including the police, do? The short answer is that it depends upon two factors: (1) for immediate action, the focus is whether or not they have reasonable suspicion to believe that a crime is being or has been committed,<sup>143</sup> and (2) for general regulatory policy, the question is whether (as in the definition of "gang") the policy is narrowly drawn, with sufficient clarity to give notice of the type of illegal activity prohibited.

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142. U.S. CONST. amend. I.

143. Compare, e.g., *People v. Rahming*, 795 P.2d 1338 (Colo. 1990) (stating mere proximity of gang members wearing colors to rival gang members' residence was insufficient for police stop); with *State v. Whitaker* 795 P.2d 182 (Wash. 1990) (failure to prove that search was based purely on status of gang leader).

The first is association related to expression or religion, which is protected by implication from the First Amendment itself. This type of association, which would include political party or church membership, is subject to analysis under the high standards of constitutional review appropriate to speech, press and religion cases. The second is association related to close, personal relationships held by the Supreme Court to be protected by the right to privacy which is implied from the Bill of Rights and Fourteenth Amendment. The standard of review for these cases is also quite high, but the nature of the relationship is critical; if the Court has not singled it out for special protection, the State need only show a rational reason for regulating it in the public interest. The Court's refusal to extend the right to privacy to include consensual homosexual activity in the privacy of the home falls into this category.<sup>144</sup> And last, there are "other" forms of association, including association for economic or purely social purposes, which are protected only to the extent that regulations must be rationally related to some legitimate governmental purpose.

The specific associational issues which arise in the context of gang-control legislation fall into all three categories. Criminal conduct, for example, clearly falls into the "unprotected" category: the state need only show that the conduct is criminal and it is not protected. If the conduct in question fits into a "protected" category: association involving legitimate expression (e.g., display of gang insignia), or activities within what is known as the "zone of personal privacy" (e.g., laws imposing liability on family members), further analysis is required before a final judgment can be made concerning the legitimacy of criminalizing such conduct.

#### b. Membership in a Gang as Criminal Behavior

Assuming that one could get beyond the definitional problems and write a statute criminalizing "gang membership," the freedom of association question would be posed as follows: is it legitimate to make "membership" in a gang a crime?

There are only a few cases which deal with the issue of "mere" membership in an unlawful organization, and these date back to the loyalty oath era where one's "mere" membership in the Communist Party was enough (for some) to raise questions concerning one's loyalty to the United States.<sup>145</sup> The Supreme Court appears to have held that, while membership *per se* is not enough to impose disabilities on the member, membership in an organization which engages in or encourages illegal activity raises legitimate questions which would support the decision of public authorities to make further inquiries.<sup>146</sup>

As applied to gangs involved in criminal activities, such inquiry becomes a practical necessity for reasons related both to the individual rights of the

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144. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

145. *See, e.g., Shware v. Board of Bar Examiners*, 353 U.S. 232 (1957); *Konigsberg v. State Bar*, 353 U.S. 252 (1957). The Supreme Court later affirmed the decision to deny petitioner bar admission on grounds that he did not cooperate with the investigation when he refused to answer certain questions pertaining to his membership. *Konigsberg v. State Bar*, 366 U.S. 36 (1961).

146. *See Konigsberg*, 353 U.S. at 273-74 (fact of past membership is not sufficient grounds to refuse admission to bar because of disloyalty or lack of good character). The Court narrowed the scope of permissible inquiries in a later series of cases. *See Baird v. State Bar*, 401 U.S. 1, 6 (1971); *In re Stolar*, 401 U.S. 23 (1971).

As applied to gangs involved in criminal activities, such inquiry becomes a practical necessity for reasons related both to the individual rights of the person accused of crime, and others having an interest in seeing that justice is done (e.g., victims, neighbors, taxpayers, etc.). Since the Constitution does not permit "innocent" association to be criminalized, at least some degree of knowledge of the gang's illegal activities, and the specific intent to further the gang's purpose must be demonstrated before any enforcement efforts may be undertaken with respect to a given individual.<sup>147</sup>

Given the types of initiation requirements often imposed on gang members and their high degree of social cohesiveness, it is doubtful that many novice gang members remain naive about ongoing patterns (as opposed to extent or frequency) of criminal conduct.<sup>148</sup> Nevertheless, criminal law requires proof of a reasonable suspicion of illegal activity (usually before a judge) before the authorities may act. It is this constitutionally-based need for precision and proof in all matters involving the administration of criminal justice, which explains why statutes like California's STEP Act are phrased in terms of specific acts, rather than association with a "gang," however defined.

Even more interesting questions lie on the "public interest" side of the equation. Police and other law enforcement personnel need and use data on gangs, their members, and their activities to establish patterns and profiles which are useful tools of the trade. As might be expected, the extent to which the police may rely upon established patterns in gang territories as the reasons upon which they seek to defend against claims that their criminal procedure rights have been violated varies in accordance with the facts of each case.<sup>149</sup> Gang membership is generally relevant, but, standing alone, it is not determinative.<sup>150</sup> For this reason, the collection and storage of data on gang members can raise potentially serious questions about invasion of privacy and

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narrowed the scope of permissible inquiries in a later series of cases. *See Baird v. State Bar*, 401 U.S. 1, 6 (1971); *In re Stolar*, 401 U.S. 23 (1971).

147. Such knowledge must be shown to exist, however. *See, e.g., State v. McGowan*, 789 S.W.2d 242 (Mo. App. 1990) (evidence established that defendant met with other members of the gang to plan confrontation with rival gang, that he was armed with a revolver which he carried when other gang members went to provoke a fight and remained in the area while the gang shot indiscriminately in a populated area); *State ex rel. Juvenile Department of Multnomah County v. Holloway*, 553, 795 P.2d 589 (Or. 1990) (failure to prove that a minor aided and abetted gang-related homicide); *Commonwealth v. Stern*, 573 A.2d 1132 (Pa. 1990) (prosecutor's reference to past gang activity was proper as showing intent and motive for murder).

148. *See generally* DANIEL J. MONTI, *WANNABE: GANGS IN SUBURBS AND SCHOOLS* (Blackwell Publishers, 1994).

149. *See, e.g., People v. Christopher B.*, 219 Cal. App. 3d 455 (1990) (concerning what constitutes an "arrest" by member of a gang task force in case where gang members were wearing colors and congregated in a large group and one member dropped a bag of cocaine); *Commonwealth v. Wolcott*, 548 N.E.2d 1271 (Mass. 1989) (suspect's rights violated when expert in gang violence case was unqualified to testify).

150. *See, e.g., People v. Gonzalez*, 544 N.E.2d 1044 (Ill. 1989) (holding prejudicial evidence regarding gang affiliation irrelevant under the circumstances); *People v. Dajuan Banks*, 632 N.E.2d 257 (1994) (sentencing court can properly consider defendant's gang membership when it was admitted in a pre-sentence investigation report); *State v. Smith*, 825 P.2d 741 (1992) (defendant's membership in criminal gang justified exceptional sentence); *State v. Johnson*, 873 P.2d 514 (Wash. 1994) (gang-motivation aggravating sentence justified by impact of crime on community).

In addition to law enforcement needs, the rights of others, potential witnesses for example, make further inquiry into a gang-member's association with a gang relevant to the non-gang-member's safety. The Illinois Court of Appeals has noted in another context that,

Common life experience teaches us that gang members often protect one another, and consequently the implication that the jurors' safety might be in question is legitimate.... Furthermore, experience with criminal trials teaches that a juror's daily association in the neighborhood where the crime occurred would be a common reason for a peremptory challenge [to the juror's qualifications] with or without gang activities in the area.<sup>153</sup>

### c. Parental Responsibility Laws

Perhaps the most controversial provision of California's STEP Act is that which makes it a misdemeanor for parents to fail "to exercise reasonable care, supervision, protection and control over their minor children" who may be members of gangs. California Penal Code section 272, as amended in 1988, provides a range of criminal penalties for what is commonly known as "contributing to the delinquency of a minor;" and specifically imposes a duty of parental surveillance: "For purposes of this section, a parent or legal guardian to any person under the age of 18 years shall have the duty to exercise reasonable care, supervision, protection, and control over their minor child."<sup>154</sup>

While not specifically directed at gangs, Section 272 reflects the California Legislature's findings that there is evidence that "gang involvement among youth begins at an early age...[and] that the parents of gang members lack appropriate parenting skills."<sup>155</sup>

The first gang-related case brought under this provision involved a mother who was charged because she allegedly condoned her son's membership in a street gang by posing for a photograph in a gang T-shirt and allowing her children to pose for pictures while displaying weapons.<sup>156</sup> Though the case was eventually dropped when it was found that the woman had taken courses

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153. *People v. Williams*, 532 N.E.2d 1044 (3d Dist. Ill. 1988) (rejecting claim of racial discrimination in the prosecutor's exclusion of a neighborhood resident), *citing* *People v. Carradine*, 287 N.E.2d 670 (Ill., 1972) (witness to homicide preferred six months of imprisonment for contempt rather than to testify against local members of the Blackstone Rangers gang).

154. CAL. PENAL CODE § 272 (Deering 1990), as amended by 1988 Cal. S.B. 15. *See also*, CAL. WELF. & INST. CODE § 300(b) (Juvenile Court has jurisdiction where "[t]he minor has suffered, or there is a substantial risk that the minor will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the minor....") (current through 1993 portion of the 1993-94 legislative session); § 601 (habitual truancy); § 602 ("Any person who is under the age of 18 years when he violates any law of this state or of the United States or any ordinance of any city or county of this state defining crime other than an ordinance establishing a curfew based solely on age, is within the jurisdiction of the juvenile court, which may adjudge such person to be a ward of the court.")

155. CAL. PENAL CODE § 13826(d) & (e) (West Supp. 1989).

156. Seth Myrdans, *Mother Is Charged Because a Son Is California Street Gang Suspect*, NEW YORK TIMES, May 4, 1989 at A.18; *Mother of Rape Suspect Charged with Aiding Gang*, CHICAGO TRIBUNE, May 3, 1989 at 4.

children to pose for pictures while displaying weapons.<sup>156</sup> Though the case was eventually dropped when it was found that the woman had taken courses designed to help in her attempts to bring her children under control,<sup>157</sup> the thought of punishing parents for failure to control their children provoked considerable commentary.<sup>158</sup>

There is no question that California's approach sought to regulate the parent-child relationship, and that this relationship is a type of association which has been held to be deserving of special constitutional protection.<sup>159</sup> The California Legislature expressly recognized the difficulty by providing that, "[n]othing in this section is intended to disrupt the family unnecessarily or to intrude inappropriately into family life, to prohibit the use of reasonable methods of parental discipline, or to prescribe a particular method of parenting."<sup>160</sup> Nonetheless, there was little doubt that the courts would eventually be called upon to sit in judgment of parents caught in extremely difficult situations.

That judgment was not long in coming. In *Williams v. Reiner*,<sup>161</sup> a group of Los Angeles taxpayers challenged Section 272 as a waste of public funds<sup>162</sup> because they viewed its language as unconstitutionally vague, overbroad, and violative of the right to privacy. In particular they cited the arrest, jailing, and subsequent dismissal of the case of Ms. Gloria Williams, referred to above, as proof that there was a risk of prosecution under the statute<sup>163</sup>.

The Second District Court of Appeal began its analysis by determining that, as a matter of statutory construction, Section 272 requires "an 'intentional or grossly negligent failure to exercise due diligence in the performance of a

156. Seth Myrdans, *Mother Is Charged Because a Son Is California Street Gang Suspect*, NEW YORK TIMES, May 4, 1989 at A.18; *Mother of Rape Suspect Charged with Aiding Gang*, CHICAGO TRIBUNE, May 3, 1989 at 4.

157. Robert W. Welkos, *Mother Seized Under Gang Law Cleared*, L.A. TIMES, June 10, 1989 (Home ed.), § 1, pt. 1, p. 1, col. 3; *Poor Parent Charge Dropped for Mother of Gang Member*, N.Y. TIMES, June 10, 1989 (late ed. final) § 1, p. 12, col. 1.

158. See, e.g., Editorial, *Holding Parents Responsible for Teens*, CHICAGO TRIBUNE, May 9, 1989 at 22; Ellen Goodman, Editorial, *Sins of the Kids: Should Parents Pay ...*, THE WASHINGTON POST, May 9, 1989, at A23; S.H. Pillsbury, Op-Ed, *How Many Parents Can We Prosecute?: Gang Problems, Like Drug Abuse, Won't Ease Without Participants' Self-motivation*, L.A. TIMES, May 10, 1989, Metro, Part 2, at 7, col. 2; Editorial, *Parents and Crime*, THE CHRISTIAN SCIENCE MONITOR, May 10, 1989, at 20.

159. *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494 (1977) (familial relationships); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

160. CAL. WELF. & INST. CODE §300(j) (Deering 1990).

161. 2 Cal. Rptr. 2d 472 (Cal. App. 2 Dist., 1991), review granted and opinion superseded, 826 P.2d 1125 (Cal. S. Ct., 1992), rev'd by *Williams v. Garcetti*, 853 P.2d 507 (Cal. 1991).

162. Section 526a of the California Code of Civil Procedure provides, in relevant part:

An action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of, or injury to, the estate, funds, or other property of a county, town, city or city and county of this state, may be maintained against any officer thereof, or any agent, or other person, acting in its behalf, either by a citizen resident therein, or by a corporation, who is assessed for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax therein....

163. See *supra* notes 156-158 and accompanying text. The Los Angeles County District Attorney's Office had drafted detailed written guidelines for implementing the parental diversion program. The CITY ATTORNEY PARENTING PROGRAM PROCEDURES (CAPP) (April 2, 1990) are summarized in the court's opinion. See *Williams*, 2 Cal. Rptr. 2d at 478-79.

exist a union, or joint operation of act and intent, or criminal negligence,"<sup>165</sup> which necessarily presupposes that "one is not capable of committing a crime...who committed the act or made the omission charged under an ignorance or mistake of fact, which disproves any criminal intent."<sup>166</sup> With that understanding, the court went to the heart of the issue: whether it is possible to criminalize parental failure to "...exercise reasonable control and supervision over their child to prevent delinquent behavior."<sup>167</sup>

The difficulty is a fundamental one. Juvenile courts and state child welfare agencies exercise considerable oversight of parental decision-making and conduct alleged to have a harmful impact on children,<sup>168</sup> and several states, including California,<sup>169</sup> subject parents to civil damages or penalties for failure to supervise their children.<sup>170</sup> Where the penalties are civil only, the prevailing attitude of the courts was stated by the Supreme Court of Connecticut in *Watson v. Gradzik*:<sup>171</sup>

The court cannot accept the defendants' premise that the fundamental right to bear and raise children has been interfered with merely because a parent is held responsible for his child's torts. With the right to bear and raise children comes the responsibility to see that one's children are properly raised so that the rights of other people are protected.<sup>172</sup>

Indiana applies the same reasoning to gangs:

[A] parent of a child who is a member of a criminal gang [as defined in IC 35-45-9-1], who actively encourages or knowingly benefits from the child's involvement in the criminal gang, is liable for actual damages arising from harm to a person in a criminal gang activity if:

- 1) The parent has custody of the child;
- 2) The child is living with the parent or guardian; and
- 3) The parent failed to use reasonable efforts to prevent the child's involvement in the criminal gang.

Section 272, however, is a criminal statute, and, in the judgment of the Court of Appeal, it was unconstitutional because:

165. CAL. PENAL CODE § 20 (West 1991) ("In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence.").

166. CAL. PENAL CODE § 26 (West 1991).

167. *Williams*, 2 Cal. Rptr. 2d at 483.

168. This is particularly true in cases affecting health and education. See sources cited at note 154. See generally *Prince v. Massachusetts*, 321 U.S. 158 (1944).

169. *Weisbart v. Flohr*, 260 Cal. App. 2d 281 (1968); *Poncher v. Brackett*, 246 Cal. App. 2d 769, 771-73, 55 Cal. Rptr. 59 (1966); *Ellis v. D'Angelo*, 253 P.2d 675, 679-82 (Cal. App. 1953); *Curry v. Superior Court*, 20 Cal. App. 4th 180 (1993).

170. See, e.g., Illinois Parental Responsibility Law, ILL. REV. STAT. ch. 70, §§ 51-57 (1994) (holding parents or legal guardians liable for actual damages up to \$500.00 for the "willful or malicious acts of such minor which cause injury to a person or property."). See generally, Annotation: *Parents' Liability for Injury or Damage Intentionally Inflicted by Minor Child*, 54 A.L.R. 3d 974 (1990); Annotation: *Validity and Construction of Statutes Making Parents Liable for Torts Committed by Their Minor Children*, 8 A.L.R. 3d 612 (1990); Annotation: *Liability of Person Permitting Child to Have Gun, or Leaving Gun Accessible to Child, for Injury Inflicted by the Latter*, 68 A.L.R.2d 782 (1990).

171. 373 A.2d 191 (Conn. 1977).

172. *Id.* at 192 (quoted in *Vanthournout v. Burge*, 387 N.E.2d 341 (Ill. App. Ct. 1979)).

- 3) The parent failed to use reasonable efforts to prevent the child's involvement in the criminal gang.

Section 272, however, is a criminal statute, and, in the judgment of the Court of Appeal, it was unconstitutional because:

[I]t criminalizes the parents' failure to exercise reasonable care, supervision, and control over their child without establishing a standard for determining what constitutes reasonable care, supervision, and control. The amendment leaves much room for abuse and mischief in its enforcement because any law enforcement agency is free to decide, based on purely subjective factors, whether the parents exercised reasonable control and supervision over their child.<sup>173</sup>

Given the constitutionally protected status of intra-family matters,<sup>174</sup> the appellate court was "unpersuaded" that the "ordinary negligence" standard utilized in some criminal prosecutions<sup>175</sup> provided a constitutionally adequate guide for prosecutorial discretion. In that court's view, rules governing the duty to supervise minors to prevent delinquency are unlike "objective rules of driving," the duty to avoid intoxication, and other behaviors which are "regularly taught in public and private schools," the legislation was both fatally imprecise and impossible to save with a limiting judicial construction.<sup>176</sup> Since "there is no universal guide for teaching parents how to prevent delinquent behavior,"<sup>177</sup> and no indication in the history of Section 272 that the Legislature intended to import California's standards for parental civil responsibility damages into the criminal law,<sup>178</sup> the law was unconstitutional.

In a unanimous decision written by Justice Stanley Mosk, the California Supreme Court disagreed.<sup>179</sup> It noted that the California Legislature had:

enacted the amendment and the related parental diversion program as part of the Street Terrorism Enforcement and Prevention Act, the premise of which was that the State of California is in a state of crisis which has

173. *Williams v. Reiner*, 2 Cal. Rptr. 2d 392, 483 (Cal. App. 2d Dist. 1991).

174. See sources cited at *supra* note 154. See generally Note, *Constitutional Limitations on State Power to Hold Parents Criminally Liable for the Delinquent Acts of Their Children*, 44 VAND. L. REV. 441 (1991).

175. The court gave vehicular manslaughter, CAL. PENAL CODE §§ 192(c)(2-3) (West, 1991), as an example. *Williams*, 2 Cal. Rptr. 2d at 483.

176. *Williams*, 2 Cal. Rptr. 2d at 483.

177. *Id.* at 483 quoting *Bellotti v. Baird*, 443 U.S. 622, 638 (1979). Additionally, the court noted:

Unquestionably, there are many competing theories about the most effective way for parents to fulfill their central role in assisting their children on the way to responsible adulthood. While we do not pretend any special wisdom on this subject, we cannot ignore that central to many of these theories, and deeply rooted in our Nation's history and tradition, is the belief that the parental role implies a substantial measure of authority over one's children.... Properly understood, then, the tradition of parental authority is not inconsistent with our tradition of individual liberty; rather the former is one of the basic presuppositions of the latter."

*Id.* at 485.

178. By contrast, liability will attach in a civil case "when the parents' negligence made it possible and probable for the child to cause injury. *Singer v. Marx* 301 P.2d 440, 487 (Cal. 1956).

179. *Williams v. Garcetti*, District Attorney, 853 P.2d 507 (Cal. 1991)

More important for present purposes was the court's clear signal that, in attempting to "enlist parents as active participants in the effort to eradicate such gangs,"<sup>181</sup> the Legislature was well within mainstream views of both tort and family law "in addressing the problem of juvenile delinquency by making a parent criminally liable."<sup>182</sup> The only issue, in the court's view, is whether or not the parent's intentional or criminally negligent<sup>183</sup> failure to supervise or control a child "results in the child's delinquency."<sup>184</sup>

#### d. Freedom of Speech

The last inquiry derived from the First Amendment is whether or not attempts to control the dress or graffiti of gang members violates their right to freedom of speech. Since graffiti is "pure" speech, and wearing a gang's "colors" is, at very least, communicative activity, there is no question that blanket attempts to control such activity will raise serious constitutional problems: a more "targeted" approach is necessary. This is underscored by an unreported decision of the California Court of Appeals in *Renteria v. Dirty Dan's, Inc.*<sup>185</sup> Though *Renteria* did not involve a governmentally imposed dress-code, and hence no constitutional question, the California court did hold that a dress-code enforced by five topless bars which denied admission to persons wearing motorcycle gang insignia was illegal under California's Unruh Civil Rights Act.<sup>186</sup> Setting aside the Court's gratuitous observation that, "[i]mposing a topless bar dress code is the ultimate oxymoron,"<sup>187</sup> the case does raise a serious issue: to what extent must it be shown that there is an actual threat of violence or danger before steps may be taken to reduce the threat of gang violence?

181. *Id.*

182. *Id.* at n.5.

183. *Id.* at 513.

184. The court went on to note that, "[h]olding parents responsible for juvenile delinquency is not a new concept. Colorado enacted the first law holding parents criminally liable for their children's delinquent acts in 1903.' Note, *Constitutional Limitations on State Power to Hold Parents Criminally Liable for the Delinquent Acts of Their Children* 44 VAND. L. REV. 441, 446 (1991)." *Garcetti*, 853 P.2d at 510 n.5.

At present, a New York statute provides: "A person is guilty of endangering the welfare of a child when: ... [b]eing a parent, guardian or other person legally charged with the care or custody of a child less than eighteen years old, he fails or refuses to exercise reasonable diligence in the control of such child to prevent him from becoming an 'abused child,' a 'neglected child,' a 'juvenile delinquent' or a 'person in need of supervision'...." N.Y. PEN. LAW, § 260.10, subd. (2) (Lawyers Coop. 1993); see *People v. Scully* 513 N.Y.S.2d 625, 627 (1987) (statute not void for vagueness as applied); *People v. Bergerson* 218 N.E.2d 288, 290-291 (N.Y. 1966) (predecessor statute not void for vagueness).

A similar Kentucky statute provides: "A parent, guardian or other person legally charged with the care or custody of a minor is guilty of endangering the welfare of a minor when he fails or refuses to exercise reasonable diligence in the control of such child to prevent him from becoming a neglected, dependent or delinquent child." KY. REV. STAT. ANN., § 530.060, subd. (1) (Michie 1992).

Thus, though the right to privacy issue was not argued in the courts below, the court's reasoning leaves very little practical hope that such an assertion would be given serious consideration. Not only are the State's interests in the health and welfare of both the delinquent children, and of the communities they terrorize, "compelling," it would be very hard, as a practical matter, to argue that failure to supervise is a matter of "privacy" at all.

185. 198 Cal. App. 3d 1447 (1988) (designated for non-publication in the official reports pursuant to Cal. Ct. R. 976).

186. Unruh Civil Rights Act, CAL. CIVIL CODE §51 (Deering 1990).

187. 198 Cal. App. 3d 1447 at n.5.



"[i]mposing a topless bar dress code is the ultimate oxymoron,"<sup>187</sup> the case does raise a serious issue: to what extent must it be shown that there is an actual threat of violence or danger before steps may be taken to reduce the threat of gang violence?

It is in this context that the individual rights paradigm which influences contemporary constitutional decision-making begins to come under considerable strain. Gang members wear "colors" to advertise their affiliation with the enterprise and foster group cohesiveness. Experience shows that gang members and rivals identify one another by colors, graffiti, and hand signs<sup>188</sup> — all of which are communicative activity which, if innocent, are protected by the First Amendment. The problem is that innocent people also get caught wearing the "wrong" colors — and sometimes get killed for it.<sup>189</sup>

In the case where the message of the garb or graffiti either suggests illegal activity (including threats) or is written on private or public property, the law may intervene to control it.<sup>190</sup> The unresolved question is how much latitude the courts will permit in the absence of evidence of prior illegal behavior.

The California court's decision in *Renteria* indicates that it likely will be narrow,<sup>191</sup> even though the former Los Angeles District Attorney Ira Reiner has noted that the wearing of the "wrong" colors may itself provoke murder,<sup>192</sup> and School Boards around the country are considering flat bans on "gang

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187. 198 Cal. App. 3d 1447 at n.5.

188. GANGLAND, *supra* note 24, at 100-104. See also Patrick Mott, *Breaking Ties That Bind: Gangs: Four Former Members Recall the Difficulties They Overcame In Getting Away to Start New and Independent Lives*, L.A. TIMES, September 4, 1990 (Orange County ed.), at E 1; Louis Sahagun, *Gang Homicides Increase 69% In L.A. County Areas: Violence: Authorities Blame Heavy Firepower, Impact of Poverty and Appeal of a 'Trendy' Image*, L.A. TIMES, August 21, 1990 (Home ed.) at A1, col. 1 (noting that gang killings in unincorporated portions of Los Angeles County soared 69% during the first eight months of 1990, a period during which all violent crimes in the same region rose 20%).

189. E.g., Monica Copeland, *Colors Held Hostage: Gangs Have Usurped the Color Spectrum: Now How You Mix Colors Could Be A Matter Of Life Or Death*, CHICAGO TRIBUNE, September 5, 1990 (North Sports Final ed.) at "Style", p. 16 (noting that "[w]hen Angel Agosto took a shortcut home last summer he had no idea he was in the wrong place at the wrong time and wearing the wrong colors.").

190. See sources cited *supra* note 12. Compare *Los Angeles City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984) (rejecting challenge to ordinance forbidding posting signs on public property). See generally 18 U.S.C. § 1964 (1990) (RICO civil remedies); CAL. PENAL CODE § 186.22a (West Supp. 1994) (permitting a court to enjoin certain gang hangouts and activities as a "nuisance which shall be enjoined, abated and prevented, and for which damages may be recovered ..."). See also Thompson, *Los Angeles Seeks Ultimate Weapon in Gang War*, WALL STREET JOURNAL, March 30, 1988, at 18 (noting that the City of Los Angeles had obtained an injunction prohibiting trespassing, graffiti, littering, blocking streets and sidewalks, or doing anything to annoy, harass or intimidate residents of the area where the Playboy Gangster Crips were selling crack cocaine).

191. The California Attorney General has taken the same position in a formal opinion. 61 Ops. Atty. Gen. 320. Although the opinion takes the position that "business establishments may lawfully establish reasonable regulations that are rationally related to the services performed and the facilities provided," it requires that such establishments provide "convincing evidence of disruption to its business and its patrons by an identified group of persons who constitute a significant proportion of an identifiable class [before] reasonable use restrictions may be imposed on the class." *Id.*

192. Ira Reiner, Guest Editorial, *Slain Over a Baseball Cap*, N.Y. TIMES, May 18, 1989 at p. A 31, col 1.

children as young as early middle-school age "as gang wanna-bes from the larger community."<sup>194</sup> How many deaths, muggings or other violence will it take before a "compelling" interest is found by judges? One suggestion is found in the testimony of Captain Barry King of the Los Angeles County Sheriff's Department before the State Task Force on Youth Gang Violence:

We have to make the judiciary more sensitive to the kinds of concerns gangs pose. The judges appear to understand that in dealing with gangs the paradigm is one of organized crime not civil rights. They think, as many do, that today gangs are, the less violent, more of a social kind of interaction. They do not realize that there are tremendous amounts of underground money, tremendous amounts of violence.<sup>195</sup>

## *2. Freedom from Discrimination on the Basis of Race and National Origin*

As cultural sub-groupings, ethnic and racial homogeneity in youth gangs is quite common. In fact, it is the rare gang which is truly "interracial."<sup>196</sup> It is difficult, if not impossible, therefore, to apply traditional civil rights analysis to gang control legislation which is carefully drawn to regulate only illegal behavior. By definition, legislation directed at street gangs will have an impact on minorities which is likely to outweigh its impact on the majority community, and the Supreme Court has held consistently that in order to establish a constitutional violation, governmental acts must be intentionally discriminatory.<sup>197</sup> As a result, one must focus on the far more common scenario: the day-to-day operation of gang-control policy.

The most pervasive problems of discrimination in the administration of criminal justice lie in the area of official discretion: when and whom to arrest, decisions to charge or plead, and the myriad other decisions made daily by police officials and prosecuting attorneys. When these rest on racial factors, they are unconstitutional; for the state bears the burden of showing that its decisions are untainted by race discrimination.<sup>198</sup>

To the extent that gang activity is widespread within a given ethnic or racial community, any attempt to control the gang activity will be seen (by some) as racially motivated. If such bias can be proved or is apparent from a fair reading of the facts, it cannot be tolerated on grounds of either fairness or good police practice. If there is suspicion and police-community relations do not permit resolution of allegations of racially-motivated police tactics, the isolation of those who live in gang-controlled neighborhoods will simply increase. California has wisely recognized that suspicion of law enforcement motives is not conducive to success in the task of gang control, and has

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194. Shawn Hubler, *Redondo Beach Schools Expand Gang Clothing Ban*, L.A. TIMES, September 13, 1990 (Valley ed.) at B14, col. 3 (noting that the ban included a prohibition on "the presence of any apparel, jewelry, accessory, notebook or manner of grooming which, by virtue of its color, arrangement, brand name and logo or any other attribute, denotes membership in gangs.").

195. CALIFORNIA COUNCIL ON CRIMINAL JUSTICE, STATE TASK FORCE ON YOUTH GANG VIOLENCE, *supra* note 10 at 38.

196. DOLAN & FINNEY, *supra* note 24 at 63.

197. See *Washington v. Davis*, 426 U.S. 229 (1976).

198. Cf., *Holland v. Illinois*, 493 U.S. 474 (1990); *Batson v. Kentucky*, 476 U.S. 79 (1986).

fair reading of the facts, it cannot be tolerated on grounds of either fairness or good police practice. If there is suspicion and police-community relations do not permit resolution of allegations of racially-motivated police tactics, the isolation of those who live in gang-controlled neighborhoods will simply increase. California has wisely recognized that suspicion of law enforcement motives is not conducive to success in the task of gang control, and has developed mechanisms, which operate in conjunction with the STEP Act, to support community-based programs designed to address gang-related problems.<sup>199</sup>

It is notable that race discrimination by the authorities is not limited to the targets of police attention; sometimes the police themselves are the victims. Discriminatory assignment and promotion policies which assign officers to gang, immigration, or drug-related cases on the basis of race, ethnicity and language proficiency, rather than their professional qualifications or experience, have been found to be illegal under Title VII of the Civil Rights Act of 1964.<sup>200</sup>

## V. CONCLUSION

In the final analysis, the problem of "gang control" (with the emphasis on *control*) is one of law enforcement and the administration of criminal justice. While understanding the structure, patterns, sociology and demographics of gangs is extremely useful for those charged with law enforcement, sentencing and penology,<sup>201</sup> the essence of the law enforcement task is to prevent and punish criminal behavior.

It thus makes little difference in the context of criminal law whether the public officials can arrive at a consistent definition of the term "gang"; for "gangs" *per se* are not, and as a practical matter cannot be, illegal. For purposes of criminal law, the only thing absolutely required is that laws regulating criminal behavior, collective or individual, are specific, and give clear notice of what behaviors are unacceptable. Not only does this avoid the vagueness and overbreadth problems which would cast doubt on their constitutionality, but it eliminates the most significant civil rights problem of all: a decision to base conviction or punishment on factors other than guilt.

But the problems which give rise to gangs and gang-related behaviors are not, at bottom, matters for law enforcement officials. Some are, in essence, social welfare questions, and should be viewed as such.<sup>202</sup> Others are matters of individual concern and are, in short, none of the state's business.

And it is in this framework that the civil rights issues affecting gangs should be seen. The law has no legitimate concern with the speech, association,

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199. See CAL. PENAL CODE §§ 13826.6 (community-based organizations), 13826.62 (urban programs); 13826.65 (school districts).

200. See, e.g., *Gallegos v. Thornburgh*, 52 BNA Fair Empl. Prac. Cas. 343 (D.C. 1989); *Pere v. F.B.I.*, 714 F. Supp. 1414 (W.D. Tex. 1989); *Muni v. Meese*, 115 F.R.D. 63 (D.C. 1987).

201. Prison gangs are also a serious problem as well, but given the unique nature of the prison setting, full discussion is beyond the scope of this essay. See generally *Thornburgh v. Abbott*, 490 U.S. 401 (1989); *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987); *B. Bell v. Wolfish*, 441 U.S. 520 (1979).

202. For a discussion of relevant differences among such policies, see Robert A. Destro, *Equality Social Welfare and Equal Protection*, 9 HARV. J. LAW & PUB. POL'Y 53 (1986).

The problem is compounded, and masked, by pervasive suspicion of lawful authorities in some of the most gang-ridden neighborhoods. When those who enforce the law act in a lawless manner, the bonds of society itself come apart. Discrimination based on race or national origin, for example, has no place in society, much less in the administration of justice. Excessive zeal in rooting out lawless behavior on the part of gangs can also lead to violations of individual rights, justifiable suspicion of police motives, and an overall breakdown in respect for the law. Making matters appear even worse, indictments and arrests of police officers alleged to be in league with drug-dealing gang members are increasing.<sup>203</sup>

The balance is thus a difficult one to maintain, if it can ever be established. Tempering concern for the public interest with a well thought-out balancing of collective and individual interests requires careful planning, training, and, above all, open and honest communication between those who enforce the law, and those who must live under it. Such a balance is, in the final analysis the essence of civil rights. It is also the basis for a wise — some might even call it “enlightened” — public policy.

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203. See, e.g., Ruben Castaneda, *Corruption Case Has Community Roots*, WASHINGTON POST, Dec. 16, 1993, at A1.