

1-1-1990

Gang Evidence: Issues for Criminal Defense

Susan L. Burrell

Follow this and additional works at: <http://digitalcommons.law.scu.edu/lawreview>



Part of the [Law Commons](#)

Recommended Citation

Susan L. Burrell, *Gang Evidence: Issues for Criminal Defense*, 30 SANTA CLARA L. REV. 739 (1990).

Available at: <http://digitalcommons.law.scu.edu/lawreview/vol30/iss3/3>

This Article is brought to you for free and open access by the Journals at Santa Clara Law Digital Commons. It has been accepted for inclusion in Santa Clara Law Review by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact sculawlibrarian@gmail.com.

GANG EVIDENCE: ISSUES FOR CRIMINAL DEFENSE

Susan L. Burrell*

It is my belief we don't know a helluva lot about gangs. I don't know what the hell to do about it as a matter of fact.

Los Angeles Police Chief Daryl F. Gates¹

The label "gang-related" has far-reaching ramifications in criminal cases. Gang cases are singled out for investigation and prosecution by special units. At trial, gang affiliation may raise a host of evidentiary problems. At sentencing, evidence of gang membership is sure to affect the court's exercise of discretion. This article will explore the major issues that may arise when gang evidence is presented in a criminal or juvenile case. The primary focus will be on street gangs, rather than organized crime or prison gangs.

I. GANG CASES IN A SOCIETAL CONTEXT

Representation of a gang member must begin with an understanding of what gangs are and how society has treated them. Gangs are nothing new. They have survived for many centuries and have occurred in an impressive variety of geographical settings.² Despite their incorporation of the trap-

* © 1990 Susan L. Burrell. Staff Attorney, Youth Law Center, San Francisco; B.A., 1970, University of California, Los Angeles; M.L.S., 1971, University of California, Los Angeles; J.D., 1977, Loyola University School of Law, Los Angeles.

1. Wilson, *Cops Amass In Search of Ways To Combat Gangs*, S.F. Examiner, Dec. 17, 1989, at B-4, cols. 5-6.

2. Gangs have been present since at least the early seventeenth century in Europe and the eighteenth century in Asia. They were prevalent in urban centers in this country prior to the nineteenth century, and in the earlier decades of this century. They have persisted in both socialist and free market countries, and in developing as well as developed countries. In some areas of this country, it is reported that particular gangs have operated for more than 60 years, so that a Hispanic in Los Angeles may be a fourth generation gang member. I. SPERGEL, *YOUTH GANGS: PROBLEM AND RESPONSE: A REVIEW OF THE LITERATURE* (Assess-

pings of modern technology, today's gangs operate in the same milieu of poverty, racially segregated neighborhoods, and the lack of access to mainstream success in which gangs have always existed.³ Gang culture has always included turf wars and fighting among rival groups. But recently, the convergence of automatic weapons, automobiles, and drugs has contributed to high visibility gang incidents with increased media attention and public awareness.

Although gangs exist in urban settings across the nation, most of the attention in recent years has focused on Southern California. In 1979, Los Angeles County law enforcement agencies counted 279 gang-related murders; in 1980 the count reached 351. At that time, it was estimated that there were 300 gangs with 30,000 members in Los Angeles County.⁴

Over the next few years, the number of gang-related killings dropped dramatically, and then climbed steadily, reaching a high of 570 in 1989.⁵ Gang membership also

ment; Part I), (National Youth Gang Suppression and Intervention Project, A Cooperative Project with the Office of Juvenile Justice and Delinquency Planning, U.S. Department of Justice, and the School of Social Service Administration, University of Chicago, at 3-5 (Apr. 1990)) [hereinafter I. SPERGEL and hereinafter The University of Chicago study.]

3. I. SPERGEL, *supra* note 2, at 75.

4. Roderick, *Killings Drop but Unorthodox Gang Unit Project Fights for Life*, L.A. Times, Aug. 30, 1982, at II-1, col. 1; Belcher, *Gang Flare-Up a Temporary Phenomenon, Officers Say*, L.A. Times, Sept. 15, 1983, at II-5, col. 3.

5. Los Angeles County gang killings dropped to 292 in 1981, and reached a low of 205 in 1982. The numbers were relatively constant at 216 in 1983, and 212 in 1984. Crust, *L.A. Death Toll Cited in Drive to Outlaw Gang Membership*, L.A. Herald Examiner, June 9, 1987, at A-1, col. 6. There were similar decreases in other gang-related crimes. Prosecutors and law enforcement officials attributed a slight increase in 1983 murders to the parole of gang members imprisoned in the 1980-81 crackdown. Castaneda, *Rise in Gang Killings Laid to Parolees*, L.A. Times, Feb. 4, 1984, at II-1, col. 1. In 1985, gang killings climbed to 271, and in 1986 they went to 328. Crust, *supra*, at A-1. The increase appears to have been limited to certain areas where drug trafficking was rampant. Other areas of the county, particularly those where community-based anti-gang social programs were in place, had dramatic decreases in gang-related killings. Stein, *East L.A. Programs Reduce Gang Killings*, L.A. Times, Jan. 4, 1987, at II-1, col. 5 (*see also infra* note 29). The number of gang-related killings continued to rise to 387 in 1987, to 452 in 1988, and to 570 in 1989. Chen, *Throwing the Book at Gang Members: Reiner Bars Deals, Tells Prosecutors to Seek Maximum Term*, L.A. Times, Sept. 20, 1989, at II-1, col. 1; Overend & Baker, *Total Murders Down Despite Record High in Gang Killings*, L.A. Times, Jan. 10, 1989, at II-1, col. 6; Lindgren, *Tougher Drug War, More Jails Urged As Gang Violence Soars*, L.A. Times, Jan. 13, 1990, at B-3, col. 4. All of the statistics must be viewed with a certain amount of suspicion, however, since statistical

grew. By 1989, it was estimated that there were 70,000 gang members and 600 gangs in Los Angeles County alone.⁶ However, the homicide rate has not kept pace with the increase in gang membership. Thus, while in Los Angeles the absolute number of gang homicides are at an all time high,⁷ the University of Chicago study is "not convinced that these statistics portend a necessary upward spiral in gang violence."⁸

Nonetheless, public and political perception is that Southern California is in the midst of an unprecedented gang holocaust. Law enforcement agencies have responded with a variety of anti-gang strategies. The primary approach is a war model. Los Angeles Police Chief Darryl Gates has compared his officers to a military force, and the gangs to a hostile defending force. "It's like having the Marine Corps

collection methods have varied over time. See *infra* note 7.

6. Reinhold, *In the Middle of L.A.'s Gang Warfare*, N.Y. Times Magazine, May 22, 1988, at 30, 33; Lindgren, *supra* note 5, at B-3, col. 4; I. SPERGEL, *supra* note 2, at 34. One newspaper article estimated that there are 25,000 Crip and Blood gang members in Los Angeles County. That represents 25% of the county's 100,000 black men between the ages of 15 and 24 years of age. Reinhold, *supra* at 32 (citing Baker, *Gang Murder Rates Get Worse*, L.A. Times, Apr. 10, 1988). In May, 1988, the California Attorney General estimated that statewide, there were as many as 100,000 gang members. Wallace, *Van De Kamp's Report: 'Explosion' of Street Gangs*, S.F. Chronicle, May 19, 1988, at A-3, col. 4.

7. Law enforcement officials candidly admit that some of the increase in reported gang-related homicides may be due to the way statistics are kept. Overend & Baker, *supra* note 5, at II-8, cols. 5-6. In late 1988, the Los Angeles Police Department determined to begin counting gang-motivated killings, as a separate category from gang-related killings. Their previous statistics on gang-related killings counted every killing by a gang-member as gang-related, even if the death came about in a car accident or a domestic quarrel. The Department admitted that determination of gang-motivated killings would still be somewhat subjective, but vowed to develop uniform criteria for classification. Overend, *New LAPD Tally May Cut Gang-Killing Score*, L.A. Times, Oct. 20, 1988, at I-1, col. 3, I-30, cols. 1-4. Other officials confirm the lack of uniformity in data collection but suggest that gang crime is actually undercounted for political reasons. Ford, *Block Alleges Gang Crime Undercount*, L.A. Times, Feb. 7, 1990, at B-3, col. 1. A criminal intelligence analyst with the Attorney General's Crime Bureau has noted, too, that accurate gang membership figures are hard to come by because "these guys are not card carriers." Wallace, *supra* note 6.

8. I. SPERGEL, *supra* note 2, at 36-37. Nor is the reported increase in gangs and gang problems uniform around the country. For example, New York and Philadelphia statistics show a dramatic decline in gangs over the past 15 years. I. SPERGEL, *supra* note 2, at 36. Even parts of Los Angeles County have recorded a decrease in the number of gangs and gang membership over the past decade. I. SPERGEL, *supra* note 2, at 27. Sahagun, *Gang Crimes Drop Sharply in South L.A.* L.A. Times, May 4, 1990, at A-1, col. 2; see also *infra* note 30.

invade an area that is still having little pockets of resistance . . . We can't have it . . . We've got to wipe them out."⁹

In the war on gangs, identification of the enemy has been a primary focus. Some have suggested that youngsters who wear "gang clothing" should be arrested.¹⁰ For instance, after a report that the Crips gang was recruiting on a school campus, authorities questioned and photographed students who wore blue bandanas to school.¹¹ In another campaign, Los Angeles police made random street stops of young people believed to be gang members, and photographed them for police files. Community leaders complained that stops were made although these youngsters had committed no crime. In many instances, they were not even gang members.¹²

In an even more dramatic campaign, the Los Angeles Police Department conducted "sweeps" of suspected gang members from city streets. The unabashed goal of these programs was "to make life miserable for the gang members and

9. Freed, *Gates Blames Drugs, Gangs for 4% Rise in L.A. Crime*, L.A. Times, Dec. 25, 1986, at II-1, col. 6. The Los Angeles Police Department's "Community Resources Against Street Hoodlums" (CRASH), the Los Angeles Sheriff's Department "Operation Safe Streets" (OSS), and the Los Angeles County District Attorney's "Operation Hardcore" units were a direct response to the dramatic increase in gang killings during the late 1970's. Farr, *D.A. Gang Unit Cites Success in First Year*, L.A. Times, May 12, 1980, at II-1, col. 6. Beginning in 1981, the Los Angeles County Board of Supervisors also funded a multi-million dollar social agency, the Community Youth Gang Services Project, over continued objections of law enforcement agencies that the money should have been spent on additional police and prosecution efforts. Roderick, *Anti-Gang Unit Falls Under Cloud*, L.A. Times, Feb. 3, 1983, at II-1, col. 1.

10. In 1984, a series of gang-related shootings in Los Angeles felled a number of innocent bystanders. Chief of Police Daryl Gates responded with a vow to "obliterate" the violent gangs and to take "these little terrorists" off the streets. *Gates Announces New Effort Against Gang Violence*, L.A. Daily Journal, Jan. 29, 1985, at II-1. The Chief urged, among other things, that civil sanctions be imposed against suspected offenders who wore gang attire; this proposal was quietly dropped after civil libertarians pointed out the impropriety of imposing legal sanctions based on the way people look. LaGuire, *Gates Vows to Rub Out Gangs*, L.A. Herald Examiner, Oct. 18, 1984, at A-1, col. 2.

11. Blue is the gang "color" for the Crips gang. The bandana incident turned out to be a prank by 6th, 7th, and 8th graders. Parents and the NAACP were outraged at the handling of the incident, and were particularly upset that the photographs were to remain police property. Stewart, *Big Bandana Brouhaha In Benicia*, S.F. Chronicle, May 6, 1989, at A-4, col. 3.

12. Geitlin, *Latinos Hit Police Photo Surveillance In Battle Against Gangs*, L.A. Times, Valley Edition, Feb. 3, 1980, at II-1, col. 1.

make police visible to area residents."¹³ In the sweeps, police stopped and questioned anyone they suspected of gang membership, based upon, among other things, how the person was dressed.¹⁴ So many people were arrested during some sweeps that police were forced to set up a mobile booking unit at the Los Angeles Memorial Coliseum.¹⁵ Reports of the sweeps indicated that close to half of those arrested were *not* gang members.¹⁶ In addition, there were complaints that only a fraction of these arrests resulted in the filing of charges.¹⁷

Prosecutorial agencies have also employed a wide array of anti-gang strategies. During the early 1980's, the Los Angeles City Attorney won injunctions against members of three

13. Hanks, *The Legacy of a Slaying: Westwood Gang Shooting Alters Public Attitudes, Police Tactics*, L.A. Times, Sept. 11, 1989, at II-1, cols. 5-6, II-6, col. 1.

14. Pasternak and Wilkinson, *1 of 3 Killings Tied to Gangs; Sweeps Net 1,300 Arrests*, L.A. Times, Apr. 11, 1988, at II-1, col. 5, II-8, col. 3; Boyer, *210 Arrested in Crackdown on South-Central Gang Violence*, L.A. Times, Apr. 8, 1988, at B-3, col. 1; Malnic and Arax, *1,000 Officers Stage Assault Against Violent Youth Gangs*, L.A. Times, Apr. 9, 1988, at B-1, col. 4.

15. Reinhold, *Police Deployed To Curb Gangs In Los Angeles; 1,000 Officers Sweep Crime-Ridden Area*, N.Y. Times, Apr. 9, 1988, at 9, col. 6.

16. The 1988 anti-gang sweeps by Los Angeles Police Department's Operation Hammer resulted in 24,094 arrests, including 13,548 "gang members." Overend & Baker, *supra* note 5 at II-8, col. 5. More recently, in a September, 1989, the Operation Hammer anti-gang task force arrested 204 people, including 121 "suspected gang members." *204 Arrested in Weekend Sweep*, L.A. Times, Sept. 18, 1989, at I-20, cols. 2-3. An October, 1989, weekend sweep by Operation Hammer resulted in 1092 arrests, "including more than 600 gang members." *Gang-Related Violence Claims 2 Lives in L.A.*, S.F. Chronicle, Oct. 2, 1989, at A-4, col. 6. In another October, 1989, sweep Los Angeles police arrested 70 persons "including 10 suspected gang members." Kendall, *Shootings Wound 2 Despite Police Net*, L.A. Times, Oct. 7, 1989, at II-3, col. 6. A February, 1990, sweep of the San Fernando Valley netted 618 arrests, with only 270 alleged gang members. Enriquez, *618 Arrested in S.F. Valley Sweeps*, L.A. Times, Feb. 26, 1990, at B-1, col. 6. Similar tactics have been used in other parts of the State. One law-abiding black Oakland youth reported being stopped and searched a dozen times over the period of a year; another young black man said, "You can't even stand on the street here . . . It's like South Africa. If you don't have I.D., they take you to jail." Cooper, *Caught in the Crossfire*, S.F. Examiner, Image Magazine, Aug. 13, 1989, at 7-8.

17. One April, 1988, sweep resulting in 1453 arrests yielded only 103 cases, of which 58 were felonies. The NAACP called a press conference complaining that police were harassing black neighborhoods and stopping young blacks simply because of the color of their clothing, or to request identification. Ferrell, *NAACP Raps Police Over Gang Sweeps*, L.A. Times, Apr. 15, 1988, at B-1, col. 1, B-4, col. 1. Other social scientists warned that the sweeps would have a negative effect in the sense that gang strength would increase when gang members were arrested on flimsy pretexs not resulting in prosecution. McGarry and Padilla, *Experts Warn Gang Sweeps May Have a Negative Effect*, L.A. Times, Apr. 24, 1988, at B-1, col. 1.

gangs for gang-related graffiti. One well-publicized graffiti abatement program ended after "the last of a handful of defendants held in contempt for defying the injunction turned out not to be a gang member."¹⁸ Los Angeles prosecutors also filed at least one nuisance abatement action against a local gang.¹⁹ More recently, prosecutorial agencies have resolved not to plea bargain cases involving gang members and to push for maximum incarceration time, even if the crime itself was not gang-related.²⁰

Intermittently, the authorities have focused on parents of gang members.²¹ Several years ago, the Los Angeles City Attorney announced its intention to add a specialized gang unit to prosecute adult gang members, and to make parents of gang members post "peace bonds" under the century old statute, Penal Code § 701.²² The Los Angeles District Attorney announced a crackdown on truancy as well. Parents who failed to send their children to school were to be prosecuted as a part of ongoing anti-gang efforts.²³ Parents have also

18. *A Gangland Nuisance*, CAL. LAW. 20, 21 (Jan./Feb. 1988).

19. The City Attorney asked for injunctive relief against 23 types of conduct, including congregating in groups of two or more in public places, stopping traffic (presumably to make drug sales), being "boisterous," remaining in one place for more than five minutes at a time, and having visitors in their residence for less than ten minutes at a time. Most of the claims were rejected, but the court did place the gang on notice that they must not trespass, relieve themselves in public, deface other's property with graffiti, block streets or sidewalks, or annoy, harass, intimidate, threaten or molest the neighbors. *A Gangland Nuisance*, *supra* note 18, at 20-21 (citing *People v. Playboy Gangster Crips*, No. WEC 118860 (L.A. Super. Ct.); Feldman, *Judge Raps City Atty's Bid To Neutralize Gangs*, L.A. Times, Dec. 11, 1987, at II-3, col. 1.

20. Chen, *supra* note 5, at II-1, col. 1. Los Angeles District Attorney Ira Reiner instituted a policy under which gang members are to be incarcerated for as long as possible. Even for non-gang related offenses such as drinking in public, which would normally result in a fine, the policy calls for prosecutors to demand maximum jail time. Where the normal sentence would be a few months of jail time, prosecutors are required to request a state prison sentence for gang members. Said Reiner: "There is no pretense here about rehabilitation." *Id.*; see also Memo from Ira Reiner, District Attorney, to All Deputy District Attorneys (Criminal) and All District Attorney Investigators, Special Directive 89-3: Street Gang Enforcement Program (Sept. 19, 1989).

21. However, California has not yet gone so far as have authorities in some states. In one Arkansas town, an ordinance was passed permitting the jailing and public humiliation of parents whose children violate curfew. The law was passed in response to increased street gang activity. *Town Wants to Put Parents in Stockade; Law Will Punish Them for Errant Kids*, S.F. Examiner, Aug. 13, 1989, at A-6, col. 4.

22. Bottorff, *Hahn Dusts Off Old State Laws in Crackdown on Youth Gangs*, L.A. Daily Journal, Jan. 17, 1986, at II-1.

23. Chen, *D.A. Reiner Announces Crackdown on Truants*, L.A. Times, Feb. 14,

been arrested under "parental responsibility" statutes for encouraging or participating in their children's gang activities.²⁴

Nor has the Legislature been silent. For example, the Street Terrorism Enforcement and Prevention Act of 1988²⁵ makes it a crime to engage in criminal gang activity, subjects persons to sentence enhancements for criminal gang activity, creates a nuisance provision aimed at buildings in which criminal gang activity takes place, and permits the prosecution of parents under a parental responsibility theory.²⁶ Similarly, legislation has been proposed to require that children found to have committed graffiti offenses lose their driver's license for one year.²⁷ And in 1989, Los Angeles passed a special trespassing ordinance designed to help rid the city's housing projects of gang members and drug dealers.²⁸

Although there is growing recognition that the gang problem must be addressed in a broader way, governmental efforts have clearly favored prosecution and punishment over

1989, at II-3, col. 6. Less than a week later, parents at inner city schools demanded that their children be transferred to other schools because the gang problem interfered with their children's attendance. Ford and Connell, *Transfers Demanded for Students at Jordan High*, L.A. Times, Feb. 18, 1989, at I-1, col. 5.

24. These prosecutions have proved difficult, partially because of the problems in proving intent of the parent to further their children's gang activities. The first prosecution under California's newly amended parental responsibility law (codified as amend at CAL. PENAL CODE § 272 (ch. 1256, § 2, stats. (West 1988 & Supp. 1990)), was of a mother whose son had allegedly participated in a gang-related rape. The evidence was family photos of the mother posing with her son, daughter, and others who police claimed to be Crips gang members. In the photos, her son held a gun. The charges were dropped when it turned out that the woman had attended parenting classes in an attempt to better control her son. At least one lawsuit has been filed seeking to enjoin enforcement of the law on constitutional grounds. Trigoboff, *ACLU Suit Challenges Law Targeting Parents*, Youth Law News, Jul.-Aug. 1989, at 17-18; *New L.A. Law Indicts Woman As Bad Mother*, S.F. Chronicle, May 2, 1989, at A-2, col. 6; *Youth Whose Mother Was Jailed Convicted*, L.A. Times, Oct. 10, 1989, at II-2, col. 2.

25. CAL. PENAL CODE §§ 186.20-186.27 (as amended ch. 1242 § 1, ch. 1256 § 1, 1988 stats. (West 1988 & Supp. 1989)); see also *supra* note 24, for contemporaneous amendment of CAL. PENAL CODE § 272 (West 1988 & Supp. 1990).

26. See *supra* note 24 in relation to the parental responsibility provisions; see *infra* section "f. Allegations Arising from Specific Anti-Gang Legislation", for a discussion of constitutional issues relating to the Street Terrorism Act.

27. Johnson, *Plan for Graffiti Scrawlers To Lose Driver's Licenses*, S.F. Chronicle, Aug. 4, 1989, at B-7, col. 4.

28. Residents expressed fear that anyone who didn't live there, including friends, could be asked to leave. Ford, *Trespassing Ordinance Targets Drug Dealers, Gangs in Projects*, L.A. Times, Oct. 13, 1989, at B-1, col. 3, B-7, col. 1.

social services.²⁹ The Los Angeles Community Youth Gang Services Agency reports that although gang membership has more than doubled, less funding is being devoted to community-based service organizations than was available ten years ago.³⁰ The University of Chicago study warns that the California suppression strategy may result in a costly process of criminalization of young offenders and ultimately increased gang activity, which is exactly the opposite of the legislation's intent.³¹

II. DEFINITIONS DETERMINE PRACTICE

In its zeal to obliterate gangs, law enforcement has not solved the unwieldy problem of insuring accurate reporting

29. California's Gang Violence Suppression Program (ch. 1030, 1981 Stat. 3975 codified as amended at CAL. PENAL CODE § 13826 (West 1982)), focused primarily on intensified law enforcement, probation, and prosecution efforts. Even Penal Code section 13825.6 (West 1982), relating to gang suppression efforts by community-based organizations appears to treat those organizations primarily as investigative and information gathering agencies for law enforcement; the provisions for offering services to young people clearly take second priority. Only in 1986 did the Legislature add Penal Code section 13826.65 (West 1982 & Supp. 1990), bringing school districts and other educational entities into the mandated gang suppression efforts. (ch. 929, § 4 1986 stat. 3218) More recently, the governor's task force on gangs and drugs issued 100 recommendations to ameliorate gang problems, and many of them were directed at services to young people. But when it came to the part of the recommendations dealing with funding, the head of the task force said, "We do not want to be hamstrung by worrying about the costs of these things." Baker, *L.A. Outrage Makes Little Impact on Gang Epidemic*, L.A. Times, Jan. 30, 1989, at I-1, col. 1, I-3, col. 1.

30. Community Youth Gang Services (CYGS), Problem Statement (Pamphlet 1988). CYGS is a private, non-profit organization in Los Angeles, in existence since 1981. The agency provides a variety of direct services to neighborhoods where gang activity frequently occurs, including actual intervention and mediation of gang conflict, preventive educational programs, partnerships with community groups and businesses aimed at reducing gang activity, and employment programs. *Id.* CYGS and other community anti-gang programs have been credited with significantly reduced gang-related killings in East Los Angeles and South Central Los Angeles at a time when gang activity has increased in other areas of the County. Stein, *East L.A. Programs Reduce Gang Killings*, L.A. Times, Jan. 1, 1987, at II-1, col. 5. Sahagun, *supra* note 8, at A-1, col. 2. Funding is an ongoing problem for this work. There have been complaints that what limited money there is for community-based anti-gang work goes to the larger groups such as CYGS, and does not reach smaller groups. Ford, *Head of South-Central Gang Fighting Agency Assails Lack of Money*, L.A. Times, Mar. 9, 1990, at B-3, col. 5. One anti-gang agency was saved from financial demise only because its director won the lottery. Ford, *Lotto Win Keeps Strapped Anti-Gang Agency on Feet*, L.A. Times, Apr. 20, 1990, at B-1, col. 2.

31. I. SPERGEL, *supra* note 2, at 266.

of gang membership and gang activity. Although efforts are being made to improve the accuracy of law enforcement gang information systems, there is still a good deal of subjectivity in who is considered a "gang member" and what is considered a "gang-related" offense. One need look no further than the recent Los Angeles "sweeps" to be satisfied that officers are less than careful in arresting "suspected gang members." Moreover, case statistics are sometimes altered, simply to meet the needs of law enforcement.³² Similarly, some commentators have concluded that because gang members lie to police with great regularity, ". . . [p]olice and youth-serving agency statistics are useless"³³

Furthermore, as criminological theory changes over time, the characterization of what is gang-related may shift. For example, law enforcement officials have theorized that Los Angeles street gangs have expanded in the manner of organized crime, taking over the nation's cocaine trade.³⁴ This theory has recently undergone revision.³⁵ Current reports

32. I. Spergel, *supra* note 2, at 11-12, 179; *see supra* note 7.

33. Moore, *Residence and Territoriality in Chicano Gangs*, 31 SOCIAL PROBLEMS 182, 186 (1983); I. SPERGEL, *supra* note 2, at 10.

34. In 1984, police linked gang members to increased cocaine sales in South-Central Los Angeles. Initial reports were that there were 100 gangs with thousands of young members involved in cocaine trafficking. Furillo, *Cocaine Syndicates at War*, 25 L.A. Gang Murders Linked to Drug Sellers, L.A. Times, Oct. 20, 1984, at I-1, col. 5; Furillo, *South-Central Cocaine Sales Explode Into \$25 'Rocks'*, L.A. Times, Nov. 25, 1984, at II-1, col. 1. During the next couple of years police claimed that black gangs had become a nationwide network of cocaine traffickers. Murphy, *L.A. Black Gangs Likened to Organized Crime Groups*, L.A. Times, Jan. 11, 1987, at I-1, col. 3; Overend, *L.A. Gangs: Are They Migrating?*, L.A. Times, Apr. 13, 1987, at I-1, col. 1; Reich, *Surge in Gang Crime Caused by Narcotics, Police Assert*, L.A. Times, Jul. 17, 1986, at II-1, col. 1; Haddock, *Gang Activities are Big Business on Nation's Streets: Corporate Rules Bring Huge Profits*, S.F. Examiner, Dec. 4, 1988, at A-23, col. 1; Haddock, *America's home-grown terrorists; Gangs deal drugs, death throughout expanding network*, S.F. Examiner, Dec. 4, 1988, at A-1, col. 1; *see generally* OFFICE OF THE ATTORNEY GENERAL, BUREAU OF ORGANIZED CRIME AND CRIMINAL INTELLIGENCE 1986 ANNUAL REPORT ON ORGANIZED CRIME (July 1986). In a battle of the experts, the Attorney General also released a report prepared by social scientists at the University of Southern California showing close links between gangs and rock cocaine trafficking, sharply contradicting a contrary report issued by other social scientists at the University of Southern California several months earlier. Hamilton, *Study Tightly Links Gangs to Trafficking in Cocaine*, L.A. Times, Nov. 15, 1988, at II-3, col. 6. The linkage between gangs and narcotics went relatively unchallenged until 1989.

35. In some jurisdictions, law enforcement officials are even complaining that organized gangs are *not* involved in the narcotics trade. Officials in Washington, D.C., say that a major reason for increased homicides in their jurisdiction is the

conclude narcotics dealing organizations are comprised of persons who may be gang members or former gang members, but police now question whether gangs *as gangs* are involved. The suggestion now is that individual narcotics salesmen actually cross over traditional gang boundaries in order to sell drugs.³⁶ However, for narcotics users or sellers prosecuted during the initial hysteria over the gang/narcotics connection, there may have been an unwarranted characterization of particular crimes being gang-related.

The primary reason for inaccuracy is definitional—there is no agreement on what gangs are or how to determine gang membership. Some social scientists report that although fighting is a common activity, the most common activities of gangs are “. . . the same as those of many adolescent friendship groups—partying, hanging around and getting

lack of gangs or organized crime, presumably because the presence of gangs would mean that territories would be fixed. Sly, *D.C. Foundering in War on Drugs*, S.F. Examiner, Nov. 19, 1989, at A-2. Similarly, Los Angeles Sheriff Sherman Block has commented that “[t]he numerical strength of the Crips and Bloods is generally offset by their poor organization and lack of leadership As gangs they are usually unstructured and undisciplined.” Wilson, *supra* note 1, at B-4, col. 5. There is increasing evidence, too, that law enforcement has over-estimated the number of gang members involved in violent drug activity. In San Francisco, police initially believed that violence in cocaine trafficking was attributable to some 40 groups with over 1,000 members. Further analysis revealed that only about two dozen teenagers and young adults were behind most of the violence in drug dealing. DelVecchio, *S.F. Gang Violence Declines As Citizens Start Helping Cops*, S.F. Chronicle, Jan. 15, 1990, at A-1, col. 2, A-20, col. 6.

36. Los Angeles police refer to the new drug-dealing groups as “instrumental gangs.” Their loyalty is to neither a particular neighborhood or gang color, but to making money. Although individual gang members are involved in the drug trafficking organizations, police say that members of these entrepreneurial groups are generally “not the same kind of people” who make up street gangs. One high ranking Los Angeles Police Department official emphasizes that the “wild teenagers who behaved so irrationally on the streets of Los Angeles” are simply not part of the groups who “simultaneously engage in methodical drug marketing business extending to far flung cities.” Baker, *Gangs Shed Loyalty in Drug Trade's Spread*, L.A. Times, Jan. 14, 1989, at I-1, col. 2. The University of Chicago study concludes, too, that the connection between gangs, drug dealing, and violence has been overstated by law enforcement. Although there is a discernible increase in narcotics activity by persons who also happen to be gang members, the evidence does not support a conclusion that this is an organized gang activity. Los Angeles Sheriff's statistics during 1988 showed only 10% of gang homicides to be drug related. I. SPERGEL, *supra* note 2, at 48-50. This view is now gaining acceptance in government policy-making groups. See Bryant, *Communitywide Responses Crucial for Dealing With Youth Gangs*, OJJDP Juvenile Justice Bulletin (U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention) 2-3 (Sept. 1989).

high"³⁷ Other experts emphasize the unorganized, un-planned characteristics of gang activity.³⁸ Still others focus on the gang as a psycho-social support group.³⁹ Law enforcement officials tend to view gangs more negatively, as " . . . a group of youths, known criminals, or convicts from the same neighborhood or penal facility and generally of the same race, banded together for anti-social and criminal activities."⁴⁰ The University of Chicago study appropriately concludes: "Definitions in use have varied according to the perceptions and interests of the definer, academic fashions, and the changing social reality of the gang."⁴¹

The difficulty in separating the legitimate associational activities from illegal activities has plagued most definitional attempts, and it is only within the past few years that law enforcement has attempted to arrive at common legal definitions.⁴² The University of Chicago study urges, that from the perspective of policy, planning, and programming, the legal definition of gang, gang member, and gang incident should be restrictive, emphasizing the commission of criminal

37. Moore, *supra* note 33, at 186.

38.

The gang is neither a monolith nor a well-ordered entity. If anything it is the antithesis of anthill, corporation or military formation. Individuals lump together in a small group and the group interacts with other groups in changing patterns, but seldom do all the members of a gang cohere to engage in joint action. Had they the intelligence, sophistication, discipline and leadership to plan and organize, they would not have been drawn into membership. The run-of-the-mill "gang-bang"—rumble or delinquent action—involves no more than a handful of people, more often than not characterized by its spur-of-the-moment, disorganized and senseless nature.

Conot, L. A. *Gangs: Our City, Their Turf*, N.Y. Times, Mar. 22, 1987, at V-1, col. 1, V-2, col. 1.

39. Along this line is the following gang member's characterization: Being in a gang means if I didn't have no family, I'll think that's where I'll be. If I didn't have a job that's where I'd be. To me it's community help without all the community. They'll understand better than my mother or father." I. SPERGEL, *supra* note 2, at 15, *citing* HAGEDORN, PEOPLE AND FOLKS: GANGS, CRIME AND THE UNDERCLASS IN A RUST BELT CITY 131 (1988).

40. Breen & Allen, *Gang Behavior; Psychological and Law Enforcement Implications*, 52 FBI LAW ENFORCEMENT BULL. 19 (1983).

41. I. SPERGEL, *supra* note 2, at 14.

42. The State Task Force on Youth Gang Violence admitted that, as of 1986, no consistent definition of gangs was used by California law enforcement. The number one recommendation of the Task Force was the adoption of a uniform definition of gangs. STATE TASK FORCE ON YOUTH GANG VIOLENCE, FINAL REP. 9 (1986).

acts, not merely gang membership.⁴³

Even if there is agreement on exactly what a gang is, the concept of "membership" is elusive. By all definitions, gangs are loosely structured; they don't issue membership cards or hold weekly meetings.⁴⁴ Law enforcement officials admit that there are many different levels of membership.⁴⁵ Thus, to simply identify a person as a "gang member" conveys little about that person's true level of involvement or activity.⁴⁶

In addition, the 1981 Attorney General's Youth Gang Task Force confirmed the fact that youths may be forced into joining gangs and that ". . . intimidation techniques range from extorting lunch money to physical beatings."⁴⁷ Other members join gangs *not* for criminal motivations, but for identity or recognition, for protection against other gangs in the area, or for fellowship and brotherhood.⁴⁸ For a "majority of youth gang members, the gang functions as an extension of the family and may provide companionship lack-

43. I. SPERGEL, *supra* note 2, at 291-92.

44. Commander Lorne Kramer, of the Los Angeles Police Department states that, "It is a myth that street gangs are well organized with meeting halls, presidents, and boards of directors." He has compared the level of organization of most gang activity to that of pickup basketball games—whichever is available participates. "They don't sit down and develop a tactical plan," he says. Bryant, *supra* note 36, at 3. The University of Chicago study notes, too, that "Gang typologies suggest a bewildering array, complexity, and variability of structures." I. SPERGEL, *supra* note 2, at 60.

45. At least three levels of belonging are recognized by the Attorney General. ATT'Y GEN. YOUTH GANG TASK FORCE, DEPT. OF JUSTICE OF THE STATE OF CALIFORNIA, REP. ON YOUTH GANG VIOLENCE IN CALIFORNIA 14 (June 1981). The generally recognized levels of membership include "hardcore" members, who are "those few who need and thrive on the totality of gang activity." The hardcore are composed of the leadership and inner circle of active gang activity, and the gang's level of violence is largely determined by their ability to orchestrate the others into action. At the mid-level of involvement are the "associates," who "associate with the group for status and recognition." They may wear club jackets, attend social functions, and may have tattoos. Their association fulfills the need of belonging. At the low end of membership are the "peripherals" or "fringe members" who are even more tangentially related to the group. The peripherals "move 'in and out' on the basis of interest in the activity or activities." *Id.* These categories are confirmed by I. SPERGEL, *supra* note 2, at 64-65.

46. And again, the reliability of information provided to police by gang members is subject to question. See *supra* note 2.

47. ATT'Y GEN. YOUTH GANG TASK FORCE, *supra* note 45, at 12. The University of Chicago study confirms that joining a gang may be the product of rational calculation to achieve personal security for males who would otherwise be subjected to harassment or attack. I. SPERGEL, *supra* note 2, at 98.

48. I. SPERGEL, *supra* note 2, at 97-99.

ing in the gang member's home environment."⁴⁹

Although no one agrees what gangs are or what constitutes gang membership, Black, Hispanic, and Asian youths often "become" gang members based on law enforcement guesswork. A childhood nickname may be transformed into a gang "moniker," and neighborhood playmates into "homeboys."⁵⁰ Innocent sounding questions at a field interview, such as, "What do they call you?" or, "Where are you from?" can result in long term sinister complications for young people growing up in areas of high gang activity.

III. ISSUES FOR CRIMINAL DEFENSE

A. *Discovery Of Official Records Of Gang Affiliation*

Information entered in official gang files may sound unimpeachable, yet mistakes are often made. One Los Angeles police detective has explained that, "So many people have the same monikers that not only do you have to know the moniker, but what gang and what clique within the gang You can't arbitrarily go after Gumby unless you know what Gumby you are looking for because there may be a few Gumbies."⁵¹

Through formal discovery, counsel may learn what the police *think* they know about the defendant, and the source of the information. This may include gang nicknames, descriptions of cars, and even photos or descriptions of tattoos cross-referenced in gang files.⁵² Correctional facilities also maintain files on gang affiliation. The California Youth Authority, for example, maintains a special "Gang Information Sheet," which is a personal biography of the individual's gang history.⁵³ The Los Angeles District Attorney's Office has a "Criminal Street Gang Case History" form containing a sum-

49. ATT'Y GEN. YOUTH GANG TASK FORCE, *supra* note 45, at 12.

50. Feldman, *Gang Nicknames: Sometimes It Gets to Be Too Insane*, L.A. Times, Oct. 15, 1985, at II-3, col. 1.

51. *Id.*

52. R. JACKSON & W. MCBRIDE, UNDERSTANDING STREET GANGS 98-104 (1985).

53. DEPT. OF THE YOUTH AUTHORITY, OFFICE OF CRIMINAL JUSTICE PLANNING, CLASSIFICATION OF YOUTHFUL GANG MEMBERS IN LOCAL DETENTION FACILITIES (Transfer of Knowledge Workshop) (1985 Appendix).

mary of evidence of gang membership, information about parole or probation restrictions on gang association, and names of gang experts for the case.⁵⁴ All of this information is discoverable.

Discovery motions should request the guidelines or standards for entry of information into gang files, as well as procedures for updating or purging.⁵⁵ Many law enforcement agencies will *not* have systematic record keeping. For example, the January, 1986, *Final Report* of the State Task Force on Youth Gang Violence, confirmed that, on a statewide basis, California lacks a recognized definition of what a gang is, has no uniform system for collecting gang information, and does not have a systematized method for training gang unit officers.⁵⁶

B. *Search Issues: Looking Like A Gang Member Is Not Cause To Detain*

Young people in some urban centers are routinely detained or patted down, simply because they *look* like gang members.⁵⁷ Identification of gang members through clothing, tattoos or demeanor is considered to be appropriate police practice.⁵⁸ The Los Angeles Police Department gang

54. Memo from Ira Reiner, District Attorney, *supra* note 20 (copy of form appended to memo).

55. As an example, one statewide workshop proposed standards for the inclusion of data in computer gang files in juvenile detention facilities. It was proposed, among other things, that self-admission of membership be corroborated from another source, "in order to prevent manipulation of the classification system." DEPT. OF THE YOUTH AUTHORITY, OFFICE OF CRIMINAL JUST. PLANNING, *supra* note 53, at 3. Such proposed standards could be used to measure the adequacy of procedures followed in an individual case.

56. STATE TASK FORCE ON YOUTH GANG VIOLENCE, *supra* note 42, at 9. Again, the University of Chicago study has found that inadequate data about gangs results from a lack of uniformity in definitions, as well as inconsistent data collection methods. I. SPERGEL, *supra* note 2, at 10-13, 25-33, 294-95.

57. For example, a newspaper account of a custom car show sponsored by the Community Youth Gang Services Program indicated that Hawthorne Police gave "pat-down" searches to 600 people in attendance. Sample, *Youth Gangs Take a Shine to Custom Cars*, L.A. Times, Feb. 5, 1984, at II-7, col. 1. If there is any doubt about this point, it may be resolved by reference to the Los Angeles gang sweeps of the past few years. Although the purpose of those raids was to arrest suspected gang members, approximately half of those arrested were determined not to be gang members, even by police statistics. *See supra* note 16.

58. R. JACKSON & W. MCBRIDE, *supra* note 52, at 98. This may result in an inadvertent widening of the law enforcement net. There is a danger, too, that

enforcement unit ("CRASH"), in particular, has been criticized for routinely "jamming" or harassing those they believe to be gang members. "When there is dialogue between CRASH officers and gang members, it is most likely after the gang members have been stopped and frisked."⁵⁹

However, gang membership is not a crime.⁶⁰ There is no "gang member exception" to the Fourth Amendment, or to Article I, section 13 of the California Constitution. People may not be detained based solely upon their appearance.

Thus, in *People v. Holguin*,⁶¹ the defendant and others were detained in connection with two gang-related shootings. Although the officer believed that the men detained were gang members based upon their clothing and tattoos, this was not the basis for the detention. The officer had specific information that the perpetrators lived at the location where the detention was made; a car matching the description and

police may improperly interpret demeanor as "gang" activity. For example, a huge proportion of graffiti, commonly attributed to gang members, is actually the work of "taggers" who thrive on the excitement and fame enjoyed in leaving their mark. Taylor, *Ghost Bus Tries to Snare the Taggers*, L.A. Times, Mar. 26, 1990, at B-1, cols. 2-4; Haldene, *To the City's Ills, Now Add "Sport" of Graffiti Tagging*, L.A. Times, Apr. 8, 1990, at B-1, col. 1. See also *infra* notes 64-66.

59. Freed, *Policing Gangs: Case of Contrasting Styles*, L.A. Times, Jan. 19, 1986, at II-1, col. 1, II-7, col. 2. A group of black and Hispanic youths filed a claim against the Los Angeles police after allegedly being detained, beaten and wrongly accused of gang membership during a holiday picnic at a park. Said one advocate for the boys, "When white kids get together they call it a fraternity or sorority . . . [w]hen it's black or Latino kids they talk about gangs." One of the boys reported, "They would ask you what gang you were in and if you said none, they would hit you . . . Pretty soon, some of the guys started telling them the name of some gang they heard of just so they wouldn't get hit again." Ford, *Youths Allege Brutality, Racial Sturs by LAPD*, L.A. Times, Apr. 11, 1990, at B-3, col. 5, B-4, cols. 2-3.

60. Even the California Street Terrorism Enforcement and Prevention Act, (CAL. PENAL CODE §§ 186.20 et seq. (West 1988 & Supp. 1990)) does not criminalize gang membership *per se*. Penal Code section 186.21 (West 1988 & Supp. 1990) specifically recognizes the right of every citizen to "lawfully associate with others who share similar beliefs." Penal Code section 186.22 (West 1988 & Supp. 1990) criminalizes and enhances punishment only for *criminal* conduct in association with *criminal* street gangs who have engaged in a pattern of *criminal* gang activity. The Street Terrorism and Enforcement Act fails to provide an independent basis for an officer to stop persons solely upon suspicion of gang membership. A contrary interpretation of the Act would offend the constitutional right of association. See *infra* section "f", and see *In re Lincoln J.*, 223 Cal. App. 3d 322, 272 Cal. Rptr. 852 (1990), *In re Leland D.* 223 Cal. App. 3d 251, 272 Cal. Rptr. 709 (1990).

61. 213 Cal. App. 3d 1308, 262 Cal. Rptr. 331 (1989).

a van with the exact license number of one used in the shootings were in the proximity of the group; members of the group ran as the officer approached; and the officer had independent grounds to detain the group for drinking alcohol in a public place.⁶² In *Holguin*, the appearance of gang membership was a minimal part of the probable cause equation.⁶³

The dangers of acting on appearance alone are particularly acute where gang membership is the sole basis for detention. For example, dressing like a gang member⁶⁴ and

62. *Id.* at 1313-14, 262 Cal. Rptr. at 333-34.

63. Several other cases have upheld detentions or arrests where gang appearance was one element of the articulated facts showing specific criminal activity. For example, in *In re Trinidad V.*, 212 Cal. App. 3d 1077, 261 Cal. Rptr. 39 (1989), it was found reasonable for an officer to go to a house to interview occupants about graffiti on a nearby market, based on information from the market owner that members of the Nut Hood Watts gang lived at the house, and the officer's observation that the house had "NHW" and other symbols similar to those on the market. *In re Stephen L.*, 162 Cal. App. 3d 257, 208 Cal. Rptr. 453 (1984), held that it was permissible for gang detail officers to detain known gang members for vandalism where officers knew the individuals and the vandalism consisted of fresh graffiti bearing the gang's insignia. *In re Hector R.*, 152 Cal. App. 3d 1146, 1150-52, 200 Cal. Rptr. 110, 112-14 (1984), upheld the detention of gang members where the gang officer first saw weapons and suspected curfew violations. And, in *People v. Rodriguez*, 196 Cal. App. 3d 1041, 1047-48, 242 Cal. Rptr. 386, 390 (1984), police had descriptions of the perpetrator of a specific gang-related shooting, knew that the perpetrator had used an unusual primer-gray Pinto similar to one at defendant's home, and had specific information about a recent gang-related killing of defendant's brother, to bolster the officer's belief that the defendant was a gang member and should be detained for a show-up identification. Each of the cases involves information about a specific crime, and a nexus between the crime and the person detained.

64. Southern California law enforcement officials have commented on the growing number of boys who emulate the dress, mannerisms, and behavior of hard-core street gangs. Sands & Woodyard, *Hard-Core Gangs Attract Middle-Class Imitations*, L.A. Times, Dec. 25, 1989, at A-3, col.5, A-53, col. 1. Moreover, the tendency of adolescents to dress like one another, particularly in ways found offensive by authority figures, is well-known. Cf. Goodman, *Madonna Is a Scream*, L.A. Times, June 7, 1985, at II-7, col. 1. Gang attire as a fashion statement is so widespread that even schools in the suburbs have expressed concern over students adopting "the gang look." Mydans, *Latest Thrill for Affluent Youth - Joining Gangs*, S.F. Chronicle, Apr. 11, 1990, at A-11, col. 1 (reprinted from N.Y. Times). The situation is further complicated because many gangs adopt designer labels or insignias of sports teams such as the Los Angeles Raiders, Los Angeles Lakers, or Pittsburgh Steelers. Ford, *Merchants of Menace in War on Drugs*, L.A. Times, Apr. 14, 1990, at B-1, col. 2, B-4, cols. 3-6. One jeans manufacturer has even used gang attire as an advertising gimmick to sell its product. Horovitz, *New Jean Line Uses Gang Theme in Ads*, L.A. Times, Feb. 21, 1990, at D-2, col. 4. It is hard to tell who is in a gang just by looking.

tattooing⁶⁵ are not conclusive of gang membership. For some it is a stylish flirtation; for others it serves as a badge of protection against coercion from other gangs.⁶⁶ Nor is it permissible to detain or search a person based on some perceived propensity that he or she may have for violence.⁶⁷

For a detention to be valid, there must be specific and articulable facts leading the officer to believe that (1) some activity relating to *crime* has taken place or is occurring or about to occur, and (2) the person whom the officer intends to stop or detain is involved in that particular activity.⁶⁸ A police officer " . . . may not use the authority of his uniform and badge to go around promiscuously bothering citizens."⁶⁹

Nor may an officer pat-down a suspected gang member based on a generalized belief that gang members carry weapons. A pat-down search during a lawful investigatory stop is valid only if the officer has a reasonable belief, based on specific and articulable facts, that " . . . the individual whose suspicious behavior he is investigating at close range is

65. Retired gang members bear the tattoos of their active days, whether they want to or not. Rae-Dupree, *Tattoo Removal Demand Growing*, L.A. Times, (Valley News ed.), Dec. 6, 1984, II-16, col. 1.

66. H. BLOCH & A. NIEDERHOFFER, *THE GANG: A STUDY IN ADOLESCENT BEHAVIOR* 123 (1958); Cf. R. JACKSON & W. MCBRIDE, *supra* note 52, at 42; ATT'Y GEN. YOUTH GANG TASK FORCE, *supra* note 45, at 21, 23; *see also supra* note 64.

67. It is unreasonable to assume that all gang members are violent. A Los Angeles Probation Department report indicated that of the 300 identifiable gangs in East Los Angeles and the San Fernando Valley, only 150 were violent. W. Miller, *Violence By Youth Gangs and Youth Groups As a Crime Problem in Major American Cities*, 1975 MONOGRAPH FOR THE NAT. INST. FOR JUVENILE JUST. AND DELINQUENCY PREVENTION 58. In other words, half of the gangs were not violent. The University of Chicago study reports that property crime is the major type of offense committed by gang members, often in a nongang capacity. I. SPERGEL, *supra* note 2, at 34. *See also* DelVecchio, *supra* note 35.

68. Terry v. Ohio, 392 U.S. 1, 30; *In re Tony C.*, 21 Cal. 3d 888, 893, 582 P.2d 957, 959, 148 Cal. Rptr. 366, 368 (1978); *People v. Aldridge*, 35 Cal. 3d 478, 478, 674 P.2d 240, 242, 198 Cal. Rptr. 538, 540 (1984).

69. *Batts v. Superior Court*, 23 Cal. App. 3d 435, 439, 100 Cal. Rptr. 181, 184 (1972) *quoted in Tony C.*, 21 Cal. 3d at 893, 582 P.2d at 959, 148 Cal. Rptr. at 368; *Aldridge*, 35 Cal. 3d at 479, 674 P.2d at 243, 198 Cal. Rptr. at 541. Situations where appearance alone is used to justify police intrusion should be contrasted with those in which the officers have cause to believe criminal gang activity has occurred, and that the defendant is involved. For example, in *People v. Superior Court (Price)*, 137 Cal. App. 3d 90, 96-97, 186 Cal. Rptr. 734, 738 (1982), the wearing of gang "colors" was only one of a number of factors in the probable cause configuration justifying arrest in relation to a specific drive-by shooting.

armed and presently dangerous to the officer"⁷⁰

If the defendant is stopped for being a "known gang member," and there is reason to doubt the reliability of that information, there may be grounds for a *Harvey-Ojeda* type motion requiring the prosecution to trace the source of the hearsay information.⁷¹ Law enforcement agencies bear collective responsibility for acquiring and maintaining accurate information. The good faith reliance of an individual officer based on inaccurate, outdated, or incomplete information does not insulate the arrest from later scrutiny.⁷² If the source of the information cannot be proven or is inaccurate, the detention is illegal and any fruits of the arrest or ensuing search should be suppressed. Detentions are sometimes premised on the officer's belief that the detainee is subject to a probation condition prohibiting association with gang members, wearing "colors," or being present in certain parts of the city.⁷³ The validity of such court-imposed conditions has not yet been determined in published decisions.⁷⁴ Conditions addressing association, or free travel, may well be unreasonable restrictions on protected liberties.⁷⁵

70. *Terry*, 392 U.S. at 24 (quoted in *Michigan v. Long*, 463 U.S. 1032, 1047 (1983)); see also *People v. Lawler*, 9 Cal. 3d 156, 161-62, 507 P.2d 621, 623-24, 107 Cal. Rptr. 13, 15-16 (1973) (superceded by statute on other grounds in *People v. Trujillo*, 217 Cal. App. 3d 1219, 266 Cal. Rptr. 473 (1990)).

71. See, e.g., *People v. Harvey*, 156 Cal. App. 3d 516, 523-24, 319 P.2d 689, 693-94 (1958); *People v. Madden*, 2 Cal. 3d 1017, 1021, 471 P.2d 971, 973, 88 Cal. Rptr. 171, 173 (1970); *Wilson v. Superior Court*, 34 Cal. 3d 777, 781-82, 670 P.2d 325, 195 Cal. Rptr. 671, 674 (1983) cert. denied, 466 U.S. 944 (1984); *United States v. Hensley*, 469 U.S. 221, 229-33 (1985).

72. *People v. Ramirez*, 34 Cal. 3d 541, 552, 668 P.2d 761, 767-68, 194 Cal. Rptr. 454, 461 (1983); *Whitely v. Warden*, 401 U.S. 560, 565-69 (1971).

73. Such conditions are to be routinely requested in cases involving Los Angeles gang members for the express purpose of facilitating detentions or arrests. Memo from Ira Reiner, District Attorney, *supra* note 20.

74. It is clear, however, that probation officers may not impose such conditions and then enforce them. In *In re Pedro Q.*, 209 Cal. App. 3d 1368, 257 Cal. Rptr. 821 (1989), the juvenile court had imposed a probation condition that Pedro not associate with members of the "F-Troop" gang (to which the minor had belonged). When the minor was released from a juvenile camp, the probation officer unilaterally added a probation condition that Pedro not be present in a particular area of town (frequented by members of the F-Troop). When the boy was later arrested in the forbidden area, he complained that the condition had not been imposed by the court. The Court of Appeal agreed, noting that although the travel restrictions were part of a gang suppression effort, it was for the court, not the probation officer, to impose the terms of probation.

75. Probation conditions restricting the defendant's presence in particular

C. Evidentiary Objections at Trial

Gang evidence, like other evidence, is admissible if it is (1) material to the fact sought to be proved or disproved; (2) relevant, in the sense that it has any tendency in reason to prove a disputed fact; and (3) is not inadmissible because of some other rule or policy.⁷⁶ Evidence offered simply to show that the defendant is bad (and therefore committed the crime) is inadmissible.⁷⁷ The prosecutor may be unable to articulate a theory of admissibility because gang evidence often is being offered to show that the defendant is a bad person.⁷⁸

Two of the best sources of trial objections are *People v. Cardenas*⁷⁹ and Justice Staniforth's dissenting opinion in *People v. Munoz*.⁸⁰ Other major California gang evidence cases

neighborhoods have been disapproved, even in cases where the condition bears some relationship to the offense. In *People v. Beach*, 147 Cal. App. 3d 612, 621-22, 195 Cal. Rptr. 381, 386-87 (1983), a court order requiring the defendant to relocate her home to prevent future criminal activity was found to constitute unreasonable banishment in violation of her constitutional rights to privacy and to travel. An order that a prostitute not be present in a specified area of town was similarly struck down as overly broad in *In re White*, 97 Cal. App. 3d 141, 158 Cal. Rptr. 562 (1979).

76. CAL. EVID. CODE § 210 (West 1966 & Supp. 1990); *People v. Thompson*, 27 Cal. 3d 303, 315, 611 P.2d 883, 888, 165 Cal. Rptr. 289, 294 (1980).

77. CAL. EVID. CODE § 1101(a) (West 1966 & Supp. 1989); *Thompson*, 27 Cal. 3d at 317, 611 P.2d at 889, 165 Cal. Rptr. at 295.

78. Thus, in an early case involving gang evidence, *Clifton v. Superior Court*, 7 Cal. App. 3d 245, 250-52, 86 Cal. Rptr. 612, 615-17 (1970), the appellate court found that a change of venue should have been granted, in part because of pretrial publicity that the defendants were members of the Death Riders motorcycle gang. As it turned out, the defendants' gang membership was not relevant to the killing, and the characterization of the defendants as gang members was therefore prejudicial. See also *People v. McKee*, 265 Cal. App. 2d 53, 59, 71 Cal. Rptr. 26, 29 (1968) (finding pretrial publicity that the defendants were Hell's Angels had "intrinsic inflammatory qualities which, permitted to penetrate the courtroom, could impair the fairness of the trial"). Limited jury contact with publicity in that case precluded reversal. *Id.*

79. 31 Cal. 3d 897, 647 P.2d 569, 184 Cal. Rptr. 165 (1982).

80. 157 Cal. App. 3d 999, 1018-28, 157 Cal. Rptr. 271, 284-90 (1984) (Staniforth, J., dissenting). Justice Staniforth's opinion offers six reasons why the majority's conclusion that the introduction of gang evidence in *Munoz* was reversible error. These are: (1) lack of foundation or personal knowledge of witnesses as to gang evidence; (2) irrelevance; (3) examination beyond the scope of direct; (4) admission of evidence which the prosecutor conceded it was unable to prove except by hearsay; (5) undue prejudice; (6) and failure of the court to weigh prejudice.

are presented in Table 1. The cases are compared in terms of whether they involved gang-related crimes, whether gang evidence was found admissible, the nature of the gang evidence; the mode of introduction, and whether defense objections were raised at trial.

Table 1 demonstrates that gang evidence will almost always be ruled inadmissible when it is offered to show witness bias in a case which is not gang-related. The evidence is most likely to be found admissible when the offense is a gang-related offense, and the evidence is offered to show motive, identity, intent or some other theory permitted by Evidence Code section 1101(b).⁸¹ However, even in the 1101(b) cases, the evidence may be ruled inadmissible when counsel makes articulate objections.⁸² In many of the cases where gang evidence has come in on an 1101(b) theory, an inadequate trial objection was fatal to the issue on appeal.⁸³

1. *Relevance*

a. Gang Evidence Offered to Show Bias or Credibility

Relevant evidence is ". . . evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action."⁸⁴ Testimony that the defendant and his witnesses are in the same gang is relevant evidence because such com-

81. CAL. EVID. CODE § 1101(b) (West 1966 & Supp. 1989).

82. When it is anticipated that gang evidence will be offered, counsel should make an *in limine* motion to exclude the evidence. (CAL. EVID. CODE § 402 (West 1966)). In most cases, defense counsel will wish to shield the defendant from any gang references. Once in a while, however, the alleged victims may be gang affiliated as well, and counsel may decide to air everyone's tawdry associations. This may be relevant to a self-defense argument or the bias of prosecution witnesses. (CAL. EVID. CODE § 780(f) (West 1966)). Evidence of a victim's character for violence would be relevant to prove his conduct was in conformity with such character. (CAL. EVID. CODE § 1103(a)(1) (West 1966 & Supp. 1989)).

83. See, e.g., *People v. Szeto*, 29 Cal. 3d 20, 32, 623 P.2d 213, 220, 171 Cal. Rptr. 652, 659 (1981); *People v. Frausto*, 135 Cal. App. 3d 129, 140, 185 Cal. Rptr. 314, 320 (1982); *People v. Burns*, 196 Cal. App. 3d 1440, 1455, 242 Cal. Rptr. 573, 582 (1987); *People v. Beyea*, 38 Cal. App. 3d 176, 194-95, 113 Cal. Rptr. 254, 265-66 (1974).

84. CAL. EVID. CODE § 210 (West 1966).

mon group membership tends to impeach the witness by establishing bias.⁸⁵ However, admissibility on this theory depends upon a showing of common membership. Evidence that witnesses are members of a gang is irrelevant to establish bias absent proof that the defendant is a member of the same gang.⁸⁶ Moreover, gang evidence ostensibly offered to show bias must clear other evidentiary hurdles; a number of cases have found such evidence to be inadmissible because it violated other rules of evidence.⁸⁷

b. *Gang Evidence Offered to Show Motive, Identity, or Intent*

Evidence of gang membership or other gang-related criminal acts is not admissible when offered to show that the defendant's criminal propensities or bad character permit an inference that he committed the charged offense.⁸⁸ A num-

85. *In re Wing Y.*, 67 Cal. App. 3d 69, 76-79, 136 Cal. Rptr. 390, 394-96 (1977) (proper for prosecutor to ask defense alibi witnesses about common gang membership with minor to establish bias, but rebuttal evidence about reputation of the minor and the alibi witnesses as active gang members and evidence of criminal activities of the gang not pertinent to bias and, therefore, inadmissible); *People v. Munoz*, 157 Cal. App. 3d 999, 1012-13, 204 Cal. Rptr. 271, 279-80 (1984) (permissible for prosecutor to question defense alibi witness about common group membership with defendant to establish bias, but arguably improper to bring in common gang membership after witness had already admitted being defendant's friend; *see also id.* at 1018-28, 157 Cal. Rptr. at 284-90 (Staniforth, J., dissenting)); *People v. Harris*, 175 Cal. App. 3d 944, 957, 221 Cal. Rptr. 321, 330 (1986) (evidence of both defendants' gang membership admissible to show bias because of possible threats to prosecution witness who essentially failed to testify or said he could not remember what he saw); *People v. Moran*, 39 Cal. App. 3d 398, 413-14, 114 Cal. Rptr. 413, 422 (1974) (evidence that Hell's Angel went to jail to visit former member and warned him not to testify against Angels was admissible to show credibility of witness when he later testified as immunized prosecution witness). Along the same line, *United States v. Abel*, 469 U.S. 45, 52-55, (1984) permits, under the Federal Rules of Evidence, proof of the membership of the defendant and a defense witness in a prison gang (The Aryan Brotherhood), to impeach defense witness by establishing common group membership of the witness and co-defendant, and evidence that the gang's tenets require its members to lie, cheat, and steal to protect each other. However, *Abel* noted that if the organization is loosely knit and has nothing to do with the case, the inference of bias from group membership would be small or non-existent. *Id.* at 54.

86. *People v. Holt*, 37 Cal. 3d 436, 455-56, 690 P.2d 1207, 1218, 208 Cal. Rptr. 547, 558 (1984). *See also* *People v. Malone*, 47 Cal. 3d 1, 30-32, 762 P.2d 1249, 1265-68, 252 Cal. Rptr. 525, 541-43 (1988); *cf.* *People v. Rodriguez*, 196 Cal. App. 3d 1041, 1051, 242 Cal. Rptr. 386, 392.

87. *See* Table 1.

88. *Williams v. Superior Court*, 36 Cal. 3d 441, 448-50, 450 n.5, 683 P.2d

ber of cases discuss the applicable law.

In re Wing Y.,⁸⁹ arose out of the robbery of a liquor store in Monterey Park by two Chinese youths. At the adjudication, the prosecutor asked defense alibi witnesses about the Wah Ching gang, their membership in the gang, and the defendant's membership in the gang. The appellate court found the evidence of common group membership admissible on the issue of witness bias, but found irrelevant the additional rebuttal testimony in the form of a police officer's opinions as to gang membership of the minor and witnesses:

. . . [N]either the described criminal activities of Wah Ching nor the asserted active membership in the group of the minor . . . had any "tendency in reason" to prove a disputed fact, *i.e.*, the identity of the person who committed the charged offense. Membership in an organization does not lead reasonably to any inference as to the conduct of a member on a given occasion. Hence, the evidence was not relevant. It allowed, on the contrary, *unreasonable* inferences to be made by the trier of fact that the minor Wing was guilty of the offense charged on the theory of 'guilt by association.'⁹⁰

Williams v. Superior Court,⁹¹ found prejudicial error in the denial of a severance motion by a defendant who had been charged with multiple murder and other offenses stemming from two gang-related incidents occurring nine months apart. Evidence suggested that both incidents involved members of the 89 Family Blood gang. However, the rival gang in the first incident was the Green Meadow Boys, while the later shooting involved the Grape Street gang. Had the charges been filed separately, the only possible theory of relevance of the other incident would have been to establish the killer's identity. Other than the fact that both incidents were gang-related, they lacked distinctive common features to permit an inference that because the defendant committed one crime, he also committed the other.⁹²

699, 703 n.5, 204 Cal. Rptr. 700, 704-06 n.5 (1984); *see also* CAL. EVID. CODE § 1101(a) (West 1966 & Supp. 1989); *People v. Thompson*, 27 Cal. 3d 303, 316, 611 P.2d 891, 165 Cal. Rptr. 289, 295 (1980).

89. 67 Cal. App. 3d 69, 136 Cal. Rptr. 390 (1977).

90. *Id.* at 79, 136 Cal. Rptr. at 395-96 (emphasis in original).

91. 36 Cal. 3d 441, 683 P.2d 699, 204 Cal. Rptr. 700 (1984).

92. *Id.* at 450, 683 P.2d at 705, 204 Cal. Rptr. at 705.

In *People v. Perez*,⁹³ the prosecutor introduced evidence of the defendant's membership in the "CV3" gang to show identity. Evidence of a separate, later gang shooting incident was also offered to show the defendant's motive to attack a rival gang and his knowledge that the car he drove in the shooting was the stolen car. Relying on *Wing Y.*, the appellate court found the fact of gang membership irrelevant to the issue of identity, and evidence of the subsequent shooting incident irrelevant to motive.⁹⁴

In *People v. Luparello*,⁹⁵ a nongang murder and conspiracy case, the prosecutor sought to show that the co-defendant was an F-Troop gang member and that the defendant had elicited his help in the murder. Although the prosecutor had been barred from presenting such evidence directly, through the cross-examination of a police detective called by the defense, he created a series of innuendos that the F-Troop was a street gang whose members were suspected of homicides and violent attacks, and that its members had threatened a material witness. The appellate court found that such evidence was irrelevant except to show that the co-defendant had a predisposition to commit violent acts. This was found to be impermissible under Evidence Code § 1101(a).⁹⁶

A slight twist in the treatment of relevance occurred in *People v. Soto*,⁹⁷ where the defendant offered evidence of the victim's gang membership to show that the gang, and not he, had killed the victim. The appellate court upheld the exclusion of this evidence, noting that even if the victim had been a gang member, that fact would not show the conduct of other members on any given occasion. Thus, the victim's gang membership was irrelevant to the identity of her killer.⁹⁸

Even where evidence of gang membership is ruled admissible on the issue of motive, the prosecutor may not use

93. 114 Cal. App. 3d 470, 170 Cal. Rptr. 619 (1981).

94. *Id.* at 477-79, 170 Cal. Rptr. at 622-23.

95. 187 Cal. App. 3d 410, 231 Cal. Rptr. 832 (1986).

96. *Id.* at 426, 231 Cal. Rptr. at 840 (citing CAL. EVID. CODE § 1101(a) (West 1966 & Supp. 1989)).

97. 157 Cal. App. 3d 694, 204 Cal. Rptr. 204 (1984).

98. *Id.* at 712-13, 204 Cal. Rptr. at 215-16; *see also* *People v. Rodriguez*, 196 Cal. App. 3d 1041, 1050-51, 242 Cal. Rptr. 386, 392 (1987).

this opportunity to introduce extraneous evidence of bad character. In *People v. Sawyer*,⁹⁹ the court permitted limited comments on the defendants' membership in the Hell's Angels, since the prosecutor's theory was that the crime was the result of a conspiratorial attempt by the group to avenge an insult against the wife of a fellow member. However, the appellate court found additional references to the group's "potential for violence" and "infamous reputation" to exceed the permissible bounds of admissibility.

Similarly, in *People v. Beyea*,¹⁰⁰ evidence that the defendant was wearing Hell's Angels "colors" at the time of a gang-related offense was found admissible on the issue of motive. However, court found that the prosecutor's additional argument comparing the defendant's actions to Hitler's Brown shirts, Mussolini's people in Italy, Tojo's people in Japan, the Ku Klux Klan, and Lincoln Rockwell's people, overstepped permissible fair comment.¹⁰¹

Some appellate courts have concluded that gang evidence was relevant and admissible on the issue of motive, identity, or intent. In *People v. Contreras*,¹⁰² the Diamond Gang had assaulted and robbed four victims to obtain money to buy beer and drugs for the gang. The court found gang membership admissible and factually distinguished other cases in which gang membership was collateral. This was, in contrast, an action by the gang as a group for the purpose of benefitting the group. Evidence of the defendant's gang membership was relevant both to his identity as one of the participants and to his motive for participation in the conspiratorial scheme.¹⁰³

A similar result was reached in *People v. Yu*,¹⁰⁴ a multiple murder case arising out of the "Golden Dragon Massacre" by the San Francisco Joe Boys' gang. The Court of Ap-

99. 256 Cal. App. 2d 66, 63 Cal. Rptr. 749, 757 (1967). However, in *Sawyer*, the error was found harmless in part because defense counsel had raised the issue of gang membership, and because the prosecutor had stayed within the bounds of permissible comment after defense counsel objected during trial. *Id.*

100. 38 Cal. App. 3d 176, 194-96, 113 Cal. Rptr. 254, 265-66 (1974).

101. *Id.* However, there was no defense objection, and the issue was therefore deemed waived on appeal.

102. 144 Cal. App. 3d 749, 192 Cal. Rptr. 810 (1983).

103. *Id.* at 756, 192 Cal. Rptr. at 813.

104. 143 Cal. App. 3d 358, 191 Cal. Rptr. 859 (1983).

peal upheld the admission of evidence that the defendant was a Joe Boy and had ordered a prior gang murder. The theory was that the defendant had ordered the prior killing and that he was therefore involved in planning the death of other rival gang members at the Golden Dragon. As in *Contreras*, the offense was committed by the gang as a group, for gang purposes.¹⁰⁵ While the ultimate victims were non-gang member diners at the Golden Dragon, the target of the attack had been a rival gang.¹⁰⁶

More recently, *People v. Burns*,¹⁰⁷ considered the admissibility of a letter seized from a defendant at the county jail. The letter contained references to Rolling 60's Crips, threats to witnesses in the cases, and a plan to fabricate evidence, including a claim that the defendant was not present at the scene of the killings. Defense counsel moved to exclude the letter as irrelevant. The trial court said it showed consciousness of guilt, thus the letter was admitted. The Court of Appeal upheld the relevance finding, noting that the letter pertaining to gang membership showed that the sender and receiver were fellow gang members whose affiliation had been an integral factor in the crimes committed.¹⁰⁸

Few cases turn so clearly on gang involvement as does *Burns*. It is therefore important to carefully analyze the prosecutor's theory of relevance. When counsel anticipates the introduction of gang evidence, an offer of proof should be demanded. Counsel should object to the proffered evidence if the theory appears spurious, or if the evidence to be introduced would go beyond the purported relevance theory.

105. *Id.*; see *People v. Frausto*, 135 Cal. App. 3d 129, 140-43, 185 Cal. Rptr. 314, 320-22 (1982) (dictum) (summarized the cases holding that evidence of gang membership is relevant to the issue of motive). In *Frausto*, itself, trial counsel did not object to the gang evidence, and the issue on appeal was the competence of counsel. The Court of Appeal found tactical reasons explaining counsel's failure to object. *Id.* See also *In re Darrell T.*, 90 Cal. App. 3d 325, 153 Cal. Rptr. 261 (1979), in which evidence of previous incidents of gang warfare in the neighborhood was admitted to show conspiracy; apparently no objection was made, and the opinion does not address the admissibility issue. As in *Frausto*, *Contreras* and *Yu*, the fact situation was one involving a gang against gang offense.

106. *People v. Plasencia*, 168 Cal. App. 3d 546, 223 Cal. Rptr. 786 (1985), arose out of the same offense and resulted in similar evidentiary rulings by the appellate court.

107. 196 Cal. App. 3d 1440, 242 Cal. Rptr. 573 (1987).

108. *Id.* at 1455, 242 Cal. Rptr. at 582.

c. *Unduly Prejudicial Evidence of Gang Membership*

Even if gang evidence is relevant, it may still be inadmissible. Probative value is sometimes outweighed by the prejudice to the defendant, particularly where the evidence may be admitted on a tangential point. Gang evidence should be excluded under Evidence Code section 352.¹⁰⁹

The first major case to consider the impact of gang evidence on the trier of fact was *People v. Zammora*,¹¹⁰ arising out of the highly publicized Sleepy Lagoon murders of the early 1940's. In *Zammora*, the court concluded that "the use of the word 'gang' referred only to the usual and ordinary crowd of young people living in any particular neighborhood who associate themselves together, and from time immemorial have been referred to as a gang."¹¹¹ Even so, the court recognized that the term "gang" could take on a sinister meaning when associated with group activities.¹¹²

Times have changed considerably since *Zammora*.¹¹³ By the late 1960's and early 1970's, courts acknowledged that popular prejudice against groups such as the Hell's Angels might well affect the fairness of the proceedings, although the evidence was not always found prejudicial.¹¹⁴ By 1981, when *People v. Perez*,¹¹⁵ was decided, the appellate court noted that, "when the word 'gang' is used in Los Angeles, one does not have visions of characters from the 'Our Little Gang' series. The word gang as used in the case at bench connotes opprobrious implications."¹¹⁶

The following year, a plurality of the California Supreme

109. CAL. EVID. CODE § 352 (West 1966).

110. 66 Cal. App. 2d 166, 152 P.2d 180 (1944).

111. *Id.* at 215, 152 P.2d at 205.

112. *Id.*

113. Contemporary students of social history would disagree with *Zammora*'s benign characterization of the term "gang" even in 1940's Southern California. The *Zammora* trial took place during an era in which hispanic youth were subjected to openly racial attacks and pervasive negative stereotyping. See L. Valdez, *Zoot Suit* (Los Angeles, Center Theater Group, 1978).

114. See *People v. McKee*, 265 Cal. App. 2d at 59, 71 Cal. Rptr. at 29 (1968); *People v. Beyea*, 38 Cal. App. 3d 176, 194-96, 113 Cal. Rptr. 254, 265-66 (1974); *Clifton v. Superior Court*, 7 Cal. App. 3d 245, 250-52, 86 Cal. Rptr. 612, 615-617 (1970); *People v. Sawyer*, 256 Cal. App. 2d 83, 95, 63 Cal. Rptr. 749, 757 (1967).

115. 114 Cal. App. 3d 470, 170 Cal. Rptr. 619 (1981).

116. *Id.* at 479, 170 Cal. Rptr. at 623.

Court concluded that widespread publicity about rival gangs meant that the admission of gang evidence would create a substantial danger of undue prejudice.¹¹⁷ *People v. Cardenas*,¹¹⁸ was a robbery/attempted murder case involving an attack on "7-Eleven" store employees by a lone gunman. There was an alibi defense. The prosecutor elicited evidence suggesting that the El Monte Flores Gang used violence to obtain its ends. The prosecutor also attempted to create the impression that the "7-Eleven" robbery was a gang operation, and that the defendant must have committed the offense because of his membership in the gang. The California Supreme Court ruled that this line of questioning was improper, insofar as it did not relate to the purported goal of showing witness bias. The Court found that to the extent that the prosecutor wanted to show that the witnesses and the defendant were from the same neighborhood, the evidence was cumulative. All of the witnesses had already admitted being neighborhood friends to the defendant. Apart from the limited probative value, the evidence created a substantial danger of undue prejudice:

There was a real danger that the jury would improperly infer that appellant had a criminal disposition because (1) the El Monte Flores was a youth gang; (2) such gangs commit criminal acts; and (3) appellant was a member of the Flores gang.¹¹⁹

Thus, *Williams v. Superior Court*,¹²⁰ suggested that evidence of common gang membership to link separate offenses "might very well mitigate *against* admissibility of one offense in the trial of the other," since it would be of limited probative value, yet would create a "significant danger of unnecessary prejudice."¹²¹ The Court noted that even where a single offense is involved, evidence of gang membership may be unduly prejudicial, despite some limited probative value.¹²²

117. *People v. Cardenas*, 31 Cal. 3d 897, 647 P.2d 569, 184 Cal. Rptr. 165 (1982).

118. *Id.*

119. *Id.* at 904-05, 683 P.2d at 705, 184 Cal. Rptr. at 168.

120. 36 Cal. 3d 441, 683 P.2d 705, 204 Cal. Rptr. 700 (1984).

121. *Id.* at 450, 683 P.2d at 711, 204 Cal. Rptr. at 706.

122. *Id.* Again, a proper objection must be made in the trial court. Even in

There was a similar interplay between relevance and California Evidence Code section 352 prejudice in *Wing Y*.¹²³ The trial court permitted police officer testimony as to the minor's gang membership and the criminal nature of the Wah Ching gang on the issue of witness credibility. However, the Court of Appeal concluded that in actuality, the evidence was being offered to show that the minor committed the alleged offense. The appellate court commented that, ". . . it taxes one's credulity to believe that the trial judge was able to consider such evidence for this limited erroneous use" ¹²⁴ The court found irreparable prejudice in the admission of the evidence.¹²⁵

Further concern with undue prejudice was expressed by the appellate court in *People v. Soto*,¹²⁶ where the court upheld the exclusion of proffered defense evidence that the murder victim had once belonged to a gang and "rumors" that the killing was done by a gang. The defendant had offered the evidence to show that someone other than himself had committed the crime. The court held that the improper speculation that such evidence would engender outweighed its minimal probative value.¹²⁷

And, *People v. Munoz*¹²⁸ recognized that once a defense alibi witness had testified to being a friend of the defendant, any further evidence of mutual "club" or "gang" affiliation became cumulative and prejudicial. The *Munoz* court also noted that the use of euphemisms for the word "gang," including "association," "group," "club" and "brothers," was transparently ineffectual and unduly prejudicial.¹²⁹ However, in view of the defense counsel's acquiescence, the prosecutor's limited questions, and the neutral responses, the error was found harmless.¹³⁰

People v. Malone, 47 Cal. 3d 1, 30-31, 762 P.2d 1249, 1265-68, 252 Cal. Rptr. 525, 542 (1988), where the the gang evidence came up in the context of the penalty phase of a capital case, and the court apparently agreed that the evidence was unduly prejudicial, the issue was waived for failure to object.

123. 67 Cal. App. 3d 69, 136 Cal. Rptr. 390 (1977).

124. *Id.* at 78, 136 Cal. Rptr. at 395.

125. *Id.* at 79, 136 Cal. Rptr. at 396.

126. 157 Cal. App. 3d 694, 204 Cal. Rptr. 204 (1984).

127. *Id.* at 712, 204 Cal. Rptr. at 215.

128. 157 Cal. App. 3d 999, 204 Cal. Rptr. 271 (1984).

129. *Id.* at 1010-13, 204 Cal. Rptr. at 278-80.

130. *Id.* See also *id.* at 1026-29, 204 Cal. Rptr. at 289-91 (Staniforth, J., dis-

Other cases have found that the probative value of gang evidence on motive and identity outweighed any prejudice to the defendant. In *People v. Yu*,¹³¹ the court noted that "prejudicial" is not synonymous with "damaging," and that to exclude the evidence as "prejudicial" would bar evidence because it is "too relevant."¹³² And in *Frausto*, gang evidence was not seen as prejudicial, since the defendant pursued an alibi defense, blaming the shooting of a rival gang member on a third party.¹³³ Similarly, in *People v. Parrison*,¹³⁴ the appellate court found harmless error in the admission of a few references to club membership and a single reference to gang membership during a two-week trial where more than 30 witnesses testified. The court found no showing of prejudice, and the prosecutor complied with a direction to stop questioning the witnesses about gang membership.¹³⁵

In all of the cases that discuss California Evidence Code section 352, there is a close connection with the issue of relevance. Even though the objections are theoretically distinct, case law suggests that as relevance diminishes, the danger of undue prejudice increases.

d. *Gang Evidence as Hearsay*

Gang evidence is often based on rumor or multi-level hearsay. Both in the adjudicative and the sentencing phases, it is important to determine the source of conclusory statements concerning gang membership, and to move for exclusion of testimony that is not based on personal knowledge.

A hearsay issue arose in *Wing Y.*,¹³⁶ in the context of an officer's testimony that the minor had a *reputation* for membership in the Wah Ching gang. The evidence was offered to attack the credibility of defense witnesses who had stated that the minor was not presently an active gang member. The appellate court noted that this reputation evidence was hearsay, which was actually being offered to prove "that

sentencing).

131. 143 Cal. App. 3d 358, 191 Cal. Rptr. 859 (1983).

132. *Id.* at 377, 191 Cal. Rptr. at 870.

133. *People v. Frausto*, 135 Cal. App. 3d 129, 142, 185 Cal. Rptr. 314, 321 (1982).

134. 137 Cal. App. 3d 529, 187 Cal. Rptr. 123 (1982).

135. *Id.* at 540, 187 Cal. Rptr. at 129.

136. *In re Wing*, 67 Cal. App. 3d 69, 136 Cal. Rptr. 390 (1977).

the witnesses and the minor were actual members of the gang—as asserted by the unnamed reputation declarants.”¹³⁷ The court held that the officer was able to testify to gang membership on the issue of witness credibility, but only from personal knowledge.

*People v. Soto*¹³⁸ considered the admissibility of rumors that a gang, and not the defendant, killed the victim. The appellate court noted that whatever shred of relevance these vague and tenuous rumors had was dependent upon the rumors being true. Since the rumors were offered to prove the truth of the matter asserted (that, in fact, the gang did the killing), they were inadmissible hearsay.¹³⁹

In *People v. Szeto*,¹⁴⁰ another of the Golden Dragon cases, an officer gave an opinion that the defendant was a Joe Boy based, in part, on conversations with admitted Joe Boys. A plurality of the California Supreme Court declined to decide whether the opinion should have been excluded as inadmissible hearsay because trial counsel had not made a “timely and specific objection.”¹⁴¹ The dissenting opinion countered that opinions of the Joe Boys were themselves inadmissible hearsay, as was the officer’s testimony based upon those opinions: “The prosecutor should not be permitted to launder inadmissible hearsay into admissible evidence . . . by the simple expedient of passing it through the conduit of purportedly expert opinion.”¹⁴²

137. *Id.* at 78, 136 Cal. Rptr. at 395.

138. 157 Cal. App. 3d 694, 204 Cal. Rptr. 204 (1984).

139. *Id.* at 712-13, 204 Cal. Rptr. at 215-16.

140. 29 Cal. 3d 20, 623 P.2d 213, 171 Cal. Rptr. 652 (1981).

141. *Id.* at 32, 623 P.2d at 219, 171 Cal. Rptr. at 659. Several cases have upheld the testimony of police officers as experts on gang behavior; in most, defense counsel failed to challenge the officer’s expertise. In *People v. Perez*, 114 Cal. App. 3d 470, 475-79, 170 Cal. Rptr. 619, 621-23 (1981), a deputy sheriff assigned to a gang unit, with 50 hours of classroom study, testified as to the gang symbol for the Compton Varios Tres (“CV3”), and stated that it was common for gang members to tattoo themselves with that symbol. He testified further that the defendant was a gang member and that he had such a tattoo on his hand. There was no specific objection to the deputy testifying as an expert. *See also* *People v. McDaniels*, 107 Cal. App. 3d 898, 166 Cal. Rptr. 12 (1980); *In re Darrell T.*, 90 Cal. App. 3d 325, 153 Cal. Rptr. 261 (1979), where there was apparently no objection to expert testimony.

142. *People v. Szeto*, 29 Cal. 3d 20, 40, 623 P.2d 213, 171 Cal. Rptr. 652, 664 (1981). Moreover, at least one court has held that “expert testimony” based on non-specific hearsay and arrest information is insufficient to sustain a conviction under California’s criminal street gang statute, CAL. PENAL CODE § 186.22 (West

Frequently hearsay comes up during the sentencing phase in the form of statements taken from police officers or probation records. It is important to know the source of such "official" statements, and counsel may consider filing a discovery motion asking how gang information is entered into police or probation records. Unsupported gang references should be stricken as unreliable hearsay and a denial of the right to confrontation.¹⁴³

e. "Expert" Testimony

With the advent of specialized prosecutorial and police gang units, a class of individuals referred to as "gang experts" has developed. Generally, the "expert" is a police officer whose expertise rests on his experiences working in the gang unit. The officer is called to give otherwise inadmissible hearsay and opinion testimony. Expert testimony must meet initial foundational requirements and, like other evidence, must be relevant to a disputed issue in the case.

California Evidence Code section 801(a),¹⁴⁴ limits expert opinions to subjects sufficiently beyond the range of common experience, so that the opinion of the expert is able to assist the trier of fact. In *People v. Szeto*,¹⁴⁵ the California Supreme Court came close to deciding the admissibility of expert testimony on the defendant's gang membership. An officer testified that the defendant was a member of the Joe Boys gang, based upon his discussions with other gang members, reports that other officers had seen the defendant with other Joe Boys, and his own observation of the defendant at a Joe Boys funeral. The majority did not reach the admissibility issue, finding instead that an inadequate objection had been made at the trial level.¹⁴⁶ The dissenting opinion viewed the issue as adequately raised and properly taken at

1988 & Supp. 1990). *In re Leland D.*, 223 Cal. App. 3d 322, 272 Cal. Rptr. 709 (1990).

143. *In re Angel E.*, 177 Cal. App. 3d 415, 419-21, 223 Cal. Rptr. 4, 5-6 (1986); see also *In re Dennis H.*, 19 Cal. App. 3d 350, 354, 96 Cal. Rptr. 791, 793-94 (1971); *People v. Calloway*, 37 Cal. App. 3d 905, 908-09, 112 Cal. Rptr. 745, 746-47 (1974); *People v. Chi Ko Wong*, 18 Cal. 3d 698, 719-22, 135 Cal. Rptr. 392, 406-07 (1976).

144. CAL. EVID. CODE § 801(a) (West 1966).

145. 29 Cal. 3d 20, 32, 623 P.2d 213, 218, 171 Cal. Rptr. 652, 659 (1981).

146. *Id.*

the trial court level. The dissent noted that even though the subject of Chinese gangs in San Francisco was beyond the common experience of the trier of fact, the jury was as capable as the officer in drawing inferences from the facts. The officer was no better situated than the jury to infer gang membership from the hearsay opinions of others or of the defendant's presence at a gang funeral.¹⁴⁷

The fact that officers have been assigned to the "gang detail" or have made many arrests in gang related cases is not sufficient to qualify them as experts. Evidence Code section 720(a)¹⁴⁸ requires that the expert himself possess special knowledge, skill, experience, training or education in the subject to which his testimony relates. Repeated observations of an event without inquiry, analysis, or experiment does not turn the mere observer into an expert.¹⁴⁹

147. *Id.* at 40, 623 P.2d at 225, 171 Cal. Rptr. at 664. Similarly, in *People v. Hernandez*, 70 Cal. App. 3d 271, 280-81, 138 Cal. Rptr. 675, 680 (1977), the appellate court reversed a case in which a narcotics officer gave an "expert opinion" that the behavior of several individuals at a street corner constituted a narcotics transaction. The court reasoned that:

They [the jury] had been informed that two of the four people who approached defendant were narcotics users and could form their own conclusions about the other two. The officer was no more expert than the jurors concerning the significance of the fact that the four persons kept looking at the area where defendant had his hands. Nor did the officer's expertise add any probative value to defendant's shaking of his head from side to side when he was approached by two other persons.

Id.; see also *In re Wing Y.*, 67 Cal. App. 3d 69, 78, 136 Cal. Rptr. 390, 395 (1977), where the appellate court refused to allow an officer to give "expert" testimony based on hearsay.

148. CAL. EVID. CODE § 720(a) (West 1966).

149. *People v. Hogan* 31 Cal. 3d 815, 852-53, 183 Cal. Rptr. 817, 838-39 (1982). There is good reason for this evidentiary principle in the field of gang evidence. The mammoth University of Chicago study reports that there is limited or no evidence to support some beliefs commonly held by law enforcement officials, including the beliefs that gangs are primary drug entrepreneurs in large cities; and that older gang members use younger gang members to carry out homicides. I. SPERGEL, *supra* note 2, at 48-49, 87, 298.

Similarly, testimony on characteristics of gang homicides by an "expert" is likely to be unilluminating, and potentially misleading. Research comparing Los Angeles Sheriff's Department gang homicide data with that for nongang homicides has revealed:

The differences [between the two groups] are not so striking as one might have expected. For example, drive-by shootings, presumably the quintessence of gang killings, occur in only 48 of 226 cases. Similarly, fear of retaliation is noted in 33% of the gang cases—one might have anticipated a higher figure—but also in 10% of the nongang cases.

Nor does street experience transform officers into behavioral scientists who can predict individual or group behavior. In *People v. Sergill*,¹⁵⁰ two officers testified that when people call up to report a crime, they are telling the truth. The appellate court found that the fact that the officers had taken numerous crime reports did not make them experts in judging truthfulness or even make this a proper subject for expert testimony.¹⁵¹

Similarly, in *McCleery v. City of Bakersfield*,¹⁵² defense counsel sought to introduce expert testimony on the subject of officer-involved shootings. The "expert" had 16 years of police experience, had investigated 1000 officer-involved shootings, had been an instructor on the subject, and had been in charge of the officer-involved shootings division of his department. The testimony to be offered included his opinion that the officers involved in the case were telling the truth, and an explanation of the officer's differing statements about the incident in question. The appellate court stated that the fact that the officer had investigated many officer-involved shootings did not suffice to make him an expert on that subject.¹⁵³ Given the novelty of the subject, the failure of the officer to have previously qualified as an expert, and the extremely vague showing of relevance for such testimony, the court concluded that the foundational showing of expertise was inadequate.¹⁵⁴

There is no coherent, precise body of knowledge on gang behavior or gang activity to synthesize officers' street experience. The University of Chicago study, clearly the most extensive review of literature on gangs to date, complains that few reliable research sources are available for a number of reasons: (1) gang members themselves are unreliable sources of information, (2) the media exaggerates or

The difference in presence of various weapons is also less striking than might have been expected.

Maxson, Gordon, & Klein, *Differences Between Gang and Nongang Homicides*, 23 CRIMINOLOGY (No. 2) 209, 212-15 (May 1985).

150. 138 Cal. App. 3d 34, 187 Cal. Rptr. 497 (1982).

151. *Id.* at 39, 187 Cal. Rptr. at 500. See also *People v. Willoughby*, 164 Cal. App. 3d 1054, 210 Cal. Rptr. 880 (1985), holding that the testimony of a "sexual trauma expert" is inadmissible on the subject of the victim's truthfulness.

152. 170 Cal. App. 3d 1059, 216 Cal. Rptr. 852 (1985).

153. *Id.* at 1072, 216 Cal. Rptr. at 861.

154. *Id.* at 1073-75 & nn. 8-9, 216 Cal. Rptr. at 816 & nn.8-9.

sensationalizes gang problems, (3) political motivations cause prosecution, probation, corrections, public service, and non-profit agencies to minimize as well as to exaggerate the extent of gang problems, (4) there has not been a consistent method of data collection for law enforcement of social agencies serving gang clients, (5) a variety of theoretical and methodological problems have hindered the development of adequate knowledge about gangs, (6) an adequate empirical data base has not existed, and (7) the "[v]ariations among gangs across neighborhoods, cities, and countries, and probably across schools, prisons, and other institutional contexts have often been disregarded."¹⁵⁵

It is unlikely, therefore, that the officer will be able to name any scholarly work on gang behavior by which his or her opinion is guided. If a work is named, chances are that it, too, will be a work written by law enforcement officers based on their subjective experience in making gang member arrests. Certainly, the officer will have no independent means by which to corroborate the validity of his opinions.

Should the prosecutor offer the testimony of a gang expert to show that a particular form of gang behavior was predictable or subject to set rules, he is essentially operating as a behavioral scientist. Thus, the more stringent *Kelly-Frye* test of admissibility should be applied in such cases.¹⁵⁶ The *Kelly-Frye* test involves a two step process: (1) the reliability of the method must be established, usually by expert testimony, and (2) the witness furnishing such testimony must be properly qualified as an expert to give an opinion on the subject.¹⁵⁷

The *Frye* test was applied in *People v. Bledsoe*,¹⁵⁸ to determine the admissibility of evidence of a psychological phenomenon referred to as the "rape trauma syndrome" on the question of guilt. This syndrome purportedly caused rape victims to delay reporting sexual assaults or to give inconsistent statements about the assaults. Several months later, in

155. I. SPERGEL, *supra* note 2, at 10-14.

156. *People v. Kelly*, 17 Cal. 3d 24, 130 Cal. Rptr. 144 (1976); *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

157. *Kelly*, 17 Cal. 3d at 30, 130 Cal. Rptr. at 148 (1976); *People v. Bledsoe*, 36 Cal. 3d 236, 245-51, 203 Cal. Rptr. 450, 456-60 (1984); CAL. EVID. CODE §§ 720, 801 (West 1966).

158. 36 Cal. 3d 236, 203 Cal. Rptr. 450 (1984).

People v. McDonald,¹⁵⁹ the court stated that the *Frye* test should be reserved for use in cases involving scientific methods, because testimony on those methods presents a danger that the trier of fact may ascribe an inordinately high degree of certainty to it.¹⁶⁰ Thus, in *McDonald*, the court found that expert testimony on psychological factors affecting eyewitness testimony was not subject to the *Kelly-Frye* test of admissibility. More recently, in *People v. Stoll*,¹⁶¹ the California Supreme Court held the *Kelly-Frye* test inapplicable to expert testimony that the defendant does not fit the profile of a person predisposed to commit lewd or incestuous acts, based upon interviews and standardized personality tests. The court noted that the methods used by the expert were not "new to psychology or the law, and that they carry no misleading aura of scientific infallibility."¹⁶² However, neither *Stoll* nor *McDonald* disapproves the *Bledsoe* application of *Kelly-Frye* to the psychological interpretation of behavior. The *Kelly-Frye* test has been applied in a number of post-*McDonald* cases involving interpretation and prediction of behavior.¹⁶³

Testimony by gang experts fails to meet the threshold requirements for admissibility under the *Kelly-Frye* test. The study of gangs has been substantially hindered by the absence of reliable data, and by the diversity of gangs themselves. There is no way for an individual officer to become qualified to render an expert opinion, because there is no reliable, generally accepted body of knowledge upon which the opinion may rest.¹⁶⁴

159. 37 Cal. 3d 351, 208 Cal. Rptr. 236 (1984).

160. *Id.* at 371-72, 208 Cal. Rptr. at 251.

161. 49 Cal. 3d 1136, 265 Cal. Rptr. 111 (1989).

162. *Id.* at 1157, 265 Cal. Rptr. at 124.

163. Although the field is far from settled, the following cases decided after *McDonald* demand that various aspects of psychological testimony meet the *Kelly-Frye* foundational requirements: *People v. Bowker*, 203 Cal. App. 3d 385, 249 Cal. Rptr. 886 (1988) (child sexual abuse accommodation syndrome testimony not admissible as predictor of child abuse); *accord People v. Bothuel*, 205 Cal. App. 3d 581, 252 Cal. Rptr. 596 (1988); *In re Sara M.*, 194 Cal. App. 3d 585, 239 Cal. Rptr. 605 (1987) (child molest syndrome testimony does not meet the *Kelly-Frye* test and cannot be used to show molestation occurred); *In re Amber B.*, 191 Cal. App. 3d 682, 236 Cal. Rptr. 623 (1987) (use of anatomically correct dolls improper for failure to meet *Kelly-Frye* foundational requirements); *accord In re Christine D.*, 206 Cal. App. 3d 469, 253 Cal. Rptr. 619 (1988); *In re Christine C.*, 191 Cal. App. 3d 676, 680, 236 Cal. Rptr. 630, 632 (1987) (expert testimony that children told the truth about molestation is subject to *Kelly-Frye* foundational showing).

164. Police often receive inaccurate information from gang informants. Breen

f. *Allegations Arising from Specific Anti-Gang Legislation*

Some cases may also involve allegations that the defendant has violated specific anti-gang criminal laws. In such cases, gang participation is itself an element of the offense. For example, California's recent Street Terrorism Enforcement and Prevention Act¹⁶⁵ provides that:

Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished by imprisonment in the county jail for a period not to exceed one year, or by imprisonment in the state prison for one, two or three years.¹⁶⁶

A second provision of the statute provides for misdemeanor or felony sentencing enhancement where a person "is convicted of a felony which is committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members"¹⁶⁷ A companion statute permits a finding that buildings used by members of a street gang constitute a nui-

& Allen, *supra* note 40, at 23. The University of Chicago study confirms that a primary reason for the lack of accurate information on gangs is that the most immediate data source, the gang member, is unreliable: "Gang members tend to conceal and exaggerate and may in fact not know the scope of the gang's activities." I. SPERGEL, *supra* note 2, at 10.

There is some evidence, too, that officers may not be truthful about the gang affiliation of the victim for fear that the inclusion of that information might lead to impeachment of the victim's character during trial. I. SPERGEL, *supra* note 2, citing L. BOBROWSKI, CHICAGO POLICE DEPARTMENT, SPECIAL FUNCTIONS GROUP, COLLECTING, ORGANIZING, AND REPORTING STREET GANG CRIME (November 1988). There is also evidence that police have manipulated data on gangs for other political gain. The police chief of one Southern California city was fired for allegedly presenting falsified statistics about the success of a gang prevention program which won his department state and national honors. Katz, *Fired Chief Used False Gang Data, Officials Say*, L.A. Times, Nov. 1, 1989, at B-3, col. 3.

165. CAL. PENAL CODE §§ 186.20-27 (West 1988 & Supp. 1990) (amended by ch. 1242, § 1, 1988 stats.; amended by ch. 1256, § 1, 1988 stat.).

166. *Id.* § 186.22(a) (West 1988 & Supp. 1990).

167. CAL. PENAL CODE § 186.22(b) (West 1988 & Supp. 1990).

sance, where they are used for the purpose of committing any of the enumerated crimes, and allows for the recovery of damages.¹⁶⁸

While some of the terms used in the Street Terrorism Act are defined,¹⁶⁹ most are not.¹⁷⁰ The Act does not even define "gang member."¹⁷¹ Challenges are beginning to occur at the trial level, but as of yet, there is no appellate court guidance on the validity of these anti-gang measures. Despite the expressed intent of the Legislature not to interfere with the constitutionally protected rights of freedom of expression and association,¹⁷² it is fair to say that this legislation poses serious constitutional problems.

Due process requires that a criminal statute provide both fair notice and fair warning of the act which it prohibits.¹⁷³ Notice is important both for the person who may violate the

168. *Id.* § 186.22(a) (West 1988 & Supp. 1990).

169. *Id.* The statute defines "pattern of criminal gang activity" as the commission, attempted commission, or solicitation of two or more specified offenses within a specified time period, and within a certain time period in relation to each other. The specified crimes include assault with a deadly weapon or by means of force likely to produce great bodily injury; robbery; unlawful homicide or manslaughter; sale, possession for sale, transportation, manufacture, offer for sale or offer to manufacture controlled substances; shooting at an inhabited dwelling or vehicle; arson; and intimidation of witnesses.

The term "criminal street gang" is defined 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 criminal acts enumerated in paragraphs (1) to (8), inclusive, of subdivision (e) [the enumerated list of crimes], 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." [Parenthetical note added.]. *Id.* Unfortunately, several of the terms used in these definitions exhibit the same lack of precision so apparent in the terms they attempt to explain.

170. The terms "actively participates;" "with knowledge that its members have engaged in a pattern of criminal activity;" "promotes, furthers, or assists;" "any felonious activity" "members of the gang;" and "for the benefit of, at the direction of or in association with;" and "one of its primary activities," are not defined by the statutory scheme.

171. This is a tragic flaw, given the recent law enforcement gang sweeps in which virtually every young black male in the vicinity was arrested, and many proved not to be gang members. *See supra* notes 16-17.

172. CAL. PENAL CODE § 186.21 (West 1988 & Supp. 1989).

173. *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391; *Grayned v. City of Rockford*, 408 U.S. 104, 108-09, (1972); *People v. Superior Court (Caswell)*, 46 Cal. 3d 381, 389, 758 P.2d 1046, 1057, 250 Cal. Rptr. 515, 518 (1988); U.S. CONST. amend. XIV; CAL. CONST. art. I, §§ 7, 15.

law, as well as for those who must enforce it.¹⁷⁴

Thus in *Lanzetta v. New Jersey*,¹⁷⁵ the United States Supreme Court overturned as vague a statute making it a crime to be a "gangster," defined as "[a]ny person not engaged in 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 . . ." The High Court found that the terms "gang," "gangster," and "known to be a member," were unconstitutionally vague, indefinite and uncertain.¹⁷⁶

The failure of California Penal Code section 186.22 to define many of the terms essential to its application and enforcement creates vagueness problems.¹⁷⁷ The absence of uniform definitions already plagues law enforcement and prosecutorial efforts in gang suppression. Because of this, the absence of statutory guidelines is particularly egregious.

The California gang legislation may also suffer from constitutional overbreadth. A statute may not sweep unnecessarily broadly, thereby invading the area of protected freedoms.¹⁷⁸ Particularly where the right of association is in-

174.

Vague laws offend several important values. First, because we assume that a man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Grayned, 408 U.S. at 108. See also *Kolender v. Lawson*, 461 U.S. 352, 360-61 (1983).

175. 306 U.S. 451 (1939).

176. *Id.* at 458.

177. As an example, persons may be subject to conviction or sentence enhancement under section 186.22 (CAL. PENAL CODE § 186.22 (West 1988 & Supp. 1989)) for association with a group whose "primary activity" is commission of the crimes enumerated in the statute. But, by all accounts, gangs and gang members engage in many other social and recreational activities which have no criminal component. The perception of criminal activity as a "primary activity" may be held by law enforcement officials, but not the gang. Thus, the statute fails to provide notice to those who may be subjected to its provisions, and fails to provide guidelines for police who may erroneously believe that all gangs fall within the primary activity test.

178. *NAACP v. Alabama ex rel Flowers*, 377 U.S. 288, 307 (1963); *Pryor v.*

volved, government interference may be permitted only upon a showing of compelling public need.¹⁷⁹ Several terms used in California Penal Code § 186.22 may well sweep in innocent persons simply by virtue of their association with persons or groups coming within the statute.

Furthermore, the right of association protects the rights of individuals to pursue a variety of political, social, economic, and recreational interests without government intrusion.¹⁸⁰ The first and fourteenth amendments¹⁸¹ prohibit the imposition of civil or criminal penalties for mere affiliation with others.¹⁸² This concept of guilt by association is not permitted by our constitutional system.¹⁸³ Even association with a group which advocates the duty, necessity or propriety of crime, sabotage, violence or unlawful methods of terrorism for political reform may not be prohibited.¹⁸⁴ Any restriction on associational freedoms must be narrowly drawn to meet some compelling government need. The lack of precision and inherent subjectivity of the anti-gang legislation demand careful attention to the underlying validity of the statutes.

Even if the Street Terrorism Act ultimately withstands constitutional scrutiny, counsel should demand proof by sufficient, competent evidence. Convictions under the Act have already been reversed for insufficiency of the evidence in at least two appellate cases. In both cases, the evidence consisted of opinion and hearsay testimony from police officers about the criminal activities of particular groups and the "membership" of the accused. A gang expert in *In re Leland*

Municipal Court, 25 Cal. 3d 238, 251, 599 P.2d 636, 642, 158 Cal. Rptr. 330, 337 (1979); *Lanzetta v. New Jersey*, 306 U.S. 451, 457 (1939).

179. *Broadrick v. Oklahoma*, 413 U.S. 601, 611, (1973); *Huntley v. Public Util. Comm'n*, 69 Cal. 2d 67, 74, 422 P.2d 685, 691, 69 Cal. Rptr. 605, 609 (1968).

180. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-62, (1958); *In re Primus*, 436 U.S. 412, 424-26, (1978); *Roberts v. United States Jaycees*, 468 U.S. 609, 617, (1984).

181. U. S. CONST. amend I, XIV; CAL CONST. art. I (provides an independent ground for protection of associational freedom); *Britt v. Superior Court*, 20 Cal. 3d 844, 852, 754 P.2d 766, 776, 143 Cal. Rptr. 695, 700 (1978).

182. *Baird v. State Bar of Arizona*, 401 U.S. 1, 6-7 (1971); *United States v. Robel*, 389 U.S. 258, 266 (1967).

183. *Uphaus v. Wyman*, 360 U.S. 72, 78-79, (1959); *Elfbrandt v. Russell*, 384 U.S. 11, 17 (1966).

184. *Brandenburg v. Ohio*, 395 U.S. 444, 448-49 (1969).

D.,¹⁸⁵ testified about the criminal purpose of the Fink White Deuces, and the minor's admission to him of membership in the group. But despite lengthy testimony about the clothing worn by the Deuces, their graffiti, and nicknames, the officer did not testify that any member had ever committed one of the enumerated criminal offenses to qualify as "engaging in a pattern of criminal activity," for purposes of Penal Code section 186.22(e). The appellate court refused to consider references to "arrests" as sufficient to show commission of a crime by a particular person. Similarly, *In re Lincoln J.*,¹⁸⁶ reversed convictions under Penal Code sections 186.22(a) and (b), where the officer's testimony was that the "BTR" gang had a propensity for fighting, and used weapons, but there was no evidence that any member of the group had committed one of the enumerated offenses within the statutory time frame. Moreover, the court found that the minor's claim of membership in the group was not pertinent, since the statute focuses on active "participation," not membership. These holdings suggest that courts will carefully examine hearsay and opinion evidence offered to support convictions under the Street Terrorism Act.

g. *Sentencing Issues*

Where gang evidence comes out at the time of sentencing (e.g. in a probation report), counsel should challenge the reliability and accuracy of the information.¹⁸⁷ References to gang affiliation that cannot be substantiated should be stricken as unreliable and prejudicial.¹⁸⁸

If the case involves a gang-related offense, the sentencing phase will be more challenging. It is then that it becomes important to counter the cold, anonymous image of gang

185. 223 Cal. App. 3d 251, 272 Cal. Rptr. 709 (1990).

186. 223 Cal. App. 3d 322, 272 Cal. Rptr. 852 (1990).

187. This is particularly so in view of written policy of some prosecutorial agencies requiring prosecutors to demand the maximum sentence for gang members regardless of the factual circumstances or mitigating factors. See Memo from Ira Reiner, District Attorney, *supra* note 20.

188. *In re Angel E.*, 177 Cal. App. 3d 415, 419-20, 223 Cal. Rptr. 4, 5-6 (1986); see also, *People v. Calloway*, 37 Cal. App. 3d 905, 908-09, 112 Cal. Rptr. 745, 746-47; *In re Dennis H.*, 19 Cal. App. 3d 350, 354, 96 Cal. Rptr. 791, 793-94 (1971); *People v. Chi Ko Wong*, 18 Cal. 3d 698, 719-21, 557 P.2d 976, 978-79, 135 Cal. Rptr. 392, 406-07 (1976).

crime with information about the individual gang member, and his outlook on the world.

Gangs are an omnipresent fact of life in parts of our cities.¹⁸⁹ The young people who join gangs voluntarily or otherwise get a sense that they are in control of their lives, at least in their own territory.¹⁹⁰ For those growing up in poverty-ridden areas, where succeeding through education or getting a job seems like an impossible dream, the exertion of physical control over one's own turf provides immediate and observable results. Offenses that seem incomprehensible to outsiders fit squarely with gang members' value system:

Traditions of solidarity and neighborhood cohesiveness runs deep. Pride in one's neighborhood, however poor it may be, is intense. The gang member has a driving need to belong and will often profess it in his last, dying breath. He not only needs to belong, but needs to tell others where he is from. This becomes so important that the greeting 'Where are you from?' (or, in Latin areas, 'De donde?') is the standard form of introduction on the street. Violence may follow a rival's response. Challenge a gang member's *barrio* or gang, and the challenger is challenging his total being . . .

. . . 'Partying' and 'getting down with the home boys' is an integral part of gang life and offers members social contacts perhaps not previously available. Loyalty outweighs personal interests. An individual cannot merely assimilate into the gang without proving his toughness and worth to the group. He must see himself as a soldier protecting his turf in an ongoing war with rival gangs The gang is the first and most important part of his life."¹⁹¹

Thus, gang activity is clearly comprehensible when viewed in its societal context.¹⁹² Because of this, counsel

189. As one Crips member put it:

You've got two choices. You either belong to this gang or that gang. There ain't no such thing as belonging to no gang. You just ain't going to be nowhere if you don't affiliate.

Farr, *Gang Members Upstage Law Officials*, L.A. Times, Mar. 8, 1981, at II-1, col. 5, II-4, col. 1.

190. Breen & Allen, *supra* note 40, at 23.

191. R. JACKSON & W. MCBRIDE, *supra* note 52, at 25-26.

192. With social pressures caused by the increased breakdown of cohesive

must convey the message that gang culture is tragic for *both* the victim and the accused. Most gang members are unskilled and poorly educated. Most are from families of low socioeconomic status, with disintegrating family structure, and most are relegated to racially segregated neighborhoods. The lifestyle options for these young people are so limited that gang affiliation seems to be the only realistic choice. The gang offers the member protection and complete acceptance.¹⁹³

Most gang members will outgrow their gang involvement. A survey from San Diego County revealed that 96 percent of documented gang members are under age 25, and 70 percent range from age 16 to 20.¹⁹⁴ A small percentage of hardcore members will go on to adult prison gangs such as Nuestra Familia or Black Guerilla Family, but most move into the normal range of adult life. The mean age of gang offenders nationally is between 17 and 19, with an average age for gang homicide offenders of 19 or 20.¹⁹⁵ This is consistent with more general crime patterns indicating that "the intensity of criminal behavior slackens after the teens, and it continues to decline with age."¹⁹⁶

family units, middle class white youth are now emulating gang dress, mannerisms, and behavior. This new form of "gang" meets unfulfilled desires for companionship and self-esteem. Said one white, middle-class member of the Los Suicycos, "It's like a hobby . . . [y]ou don't have to do it, but I like being something. You can't just go home and do nothing." Sands & Woodyard, *supra* note 64, at A-3, col. 5, A-53, col. 1.

193. R. JACKSON & W. MCBRIDE, *supra* note 52, at 8-12, 26; ATTY. GEN. YOUTH GANG TASK FORCE, *supra* note 45, at 12; I. SPERGEL, *supra* note 2, at 97-99. The pastor of a church in one gang-ridden neighborhood decries the psychological impact of poor options:

Our strategies to date in attacking the gang problem presume that the gangsters will be deterred by the likes of "Operation Hammer" [street sweeps], larger jails or tougher cops. Their despondency is deep enough to render these approaches useless. The failure of the educational system and the poor job market for minority youth have made it almost impossible for gang members to imagine a future for themselves. We assume that the youths in gangs hope for something better beyond the barrio, a future full of possibility, and would want to avoid having those dreams cut down. That assumption is wrong, and so is our reliance on it.

Boyle, *Self-Esteem: A Matter of Life, Death*, L.A. Times, Jan. 28, 1990, at M-7, col. 3.

194. STATE TASK FORCE ON YOUTH GANG VIOLENCE, *supra* note 42, at xi.

195. I. SPERGEL, *supra* note 2, at 87.

196. U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, REP. TO THE NATION ON CRIME AND JUSTICE, 42 (2d ed. Mar. 1988). The Report reveals, for

Research shows that young people leave the gang for a variety of reasons, including the influence of a girlfriend, interested adults, or parents. Other times a kind of battle fatigue sets in as the anxieties and negative consequences of gang activity take a toll on the gang member and his family. Sometimes the gang itself splinters or dissipates, enabling gang members to move on. As the youth reaches the end of adolescence, too, he may feel ready for a job and settling down, when alternative avenues are open to him.¹⁹⁷

Furthermore, observers in law enforcement recognize that imprisonment offers an open opportunity for recruitment of additional gang members and solidification of gang structures.¹⁹⁸ The California Youth Authority estimates that four out of every five inmates become affiliated with a gang.¹⁹⁹ Incarceration fails to provide the alternate role models which could counteract the allure of gang membership.²⁰⁰ Nevertheless, incarceration has predominated over placement of gang members in other types of programs. The few community-based social programs which have provided

example, that property crimes peak at age 16, and drop in half by age 22. Violent crime arrest rates peak at age 18 and drop off gradually after that. *Id.* While a small group of serious juvenile offenders go on to become adult criminals, most juvenile delinquents do not. *Id.* at 44-45. Extensive research by the Rand Corporation indicates, similarly, that most juveniles who experience one or two arrests do not continue on into adult criminality. Greenwood, *Youth Crime and Juvenile Justice in California: A Report to the Legislature* 20 (Rand Corporation, June 1983). A Rand study on chronic offenders reports on research that while nearly 40% of all males in an urban setting will be arrested during their lifetime, only 10% will experience more than 5 arrests. Greenwood & Zimring, *One More Chance: The Pursuit of Promising Intervention Strategies for Chronic Juvenile Offenders* 2 (Rand Corporation, May 1985).

197. I. SPERGEL, *supra* note 2, at 100. There is some evidence that gang members who would like to leave gangs feel pressured to stay by the threat of violence. Others stay for less frightening, but equally disturbing reasons such as the increasingly difficult economic situation which makes it difficult for them to obtain legitimate employment. I. SPERGEL, *supra* note 2, at 88, 101. But for the most part, there simply comes a time when the gang member ready to move on. As one gang veteran put it, "mostly [in a gang], you have all the youngsters, the 15 to 20-year-olds, and I guess when you're older and you have a family, you want to get away from it and take care of your family." Newman, *Latest Gang Killing Brings Total to Record 17 This Year*, L.A. Times (Orange County ed.), May 13, 1990, at A-1, col. 1, A-21, col. 6.

198. I. SPERGEL, *supra* note 2, at 216-17, 229.

199. Haddock & Ginsburg, *Crime, Punishment and CYA: The Lock-'em-up State*, S. F. Examiner, May 14, 1989, at A-1, col. 2, A-14, col. 2.

200. R. JACKSON & W. MCBRIDE, *supra* note 51, at 13-14.

paid employment to gang members appear to be successful.²⁰¹ Gang members in these programs have chosen to move away from the gang support system, and towards job-related incentives and co-worker support.²⁰² Incipient programs aimed at involving gang members in community support also show promising results.²⁰³ Law enforcement officials have begun to appreciate, accordingly, that "to effectively compete with the gangs for the hearts, minds and bodies of potential gang members, . . . we must focus on their self-worth and self-esteem, so that they do not seek out the gang to satisfy these most basic needs."²⁰⁴

IV. CONCLUSION

Despite the incredible law enforcement and prosecution efforts over the past ten years, there are more than twice as many gang members as there were then, and criminal activity has not subsided. But, gang membership need not be handled as a search and destroy mission. It is a predictable response to life as these young people have experienced it.

In many ways, the prognosis for gang members is better than that for other criminal defendants. Many will simply outgrow their criminality, particularly if they are offered job skills, remedial education, and emotional support systems providing self-esteem. Understanding the forces that draw young people into gangs, and the alternatives that may re-

201. The University of Chicago study confirms the success of the few existing training and employment programs in helping gang members to leave the gang. The study also relates the findings of one survey that even those currently involved in drug selling would, for the most part, prefer a decent-paying job to the drug life. I. Spergel, *supra* note 2, at 255. Again, much of the problem is job availability. One religious leader claims that on an average day, no less than 10 gang members seek his assistance in getting a job, despite the slim hope of success. Boyle, *supra* note 187, at M-7, col. 6.

202. R. JACKSON & W. MCBRIDE, *supra* note 51, at 14.

203. In one Los Angeles program, the Probation and Education Departments have gang members help disabled children. A majority of the participants stay in the program, improve their grades, and increase their empathy toward others. One gang member reported feeling "more kind-hearted and stuff" than he thought he could. Smith, 'Homeboys' Helping the Disabled, S.F. Examiner, Feb. 25, 1990, Sunday Punch, at 5, col. 1. For some gang members, this type of program may provide the opportunity for personal growth and responsibility so lacking in straight incarceration programs.

204. Sahagun, *Drugs Not Only Cause for Gangs Sheriff Says*, L.A. Times, Sept. 20, 1990, at B-1, col. 5 (quoting Los Angeles Sheriff Sherman Block).

place that which the gangs fulfill, is an important first step toward a solution that works. In the sentencing, as in the factfinding phase, focusing the court's attention on accurate information relating to the background and needs of the individual defendant will assure that the proceedings are fair, and that a just result is reached.

SueBurrell
January 1990

TABLE 1
COMPARISON OF HOLDINGS IN GANG CASES

Gang Evidence Purportedly Offered to Show [BIAS]	Gang-Related Offense?	Evidence Admissible?	Mode of Introduction	Objections Made?
<i>People v. Moran</i> 39 Cal. App. 3d 398 114 Cal. Rptr. 413 (1974)	Yes	Probably Yes: To bolster credibility of immunized prosecution witness; limiting instruction given and on this record, even if error, it was not prejudicial.	Prosecutor elicited evidence from witness that Hell's Angel went to jail to warn him not to testify against Angels.	Yes; grounds not specified.
<i>In re Wing Y.</i> 67 Cal. App. 3d 69 136 Cal. Rptr. 390 (1977)	No	Yes and No: D alibi witnesses may be examined on common membership with D for bias, but officer testimony on reputation of D and witnesses as gang members and criminal activities of gang was inadmissible hearsay; membership does not show conduct on given occasion.	Gang officer brought in to rebut D witnesses' denial that they and D were in gang; officer also testified to community fear of gang and criminal activities of the gang.	Relevance, lack of personal knowledge.

Gang Evidence Purportedly Offered to Show [BIAS]	Gang-Related Offense?	Evidence Admissible?	Mode of Introduction	Objections Made?
<u>People v. Cardenas</u> 31 Cal. 3d 897 184 Cal. Rptr. 165 (1982)	No	No: 352; cumulative, beyond the scope. Gang membership could be relevant to show bias, but here prosecutor used gang evidence to make improper insinuations that D was in gang and that this was gang operation.	Cross-exam of D wits. & innuendos through questions asked about "group" called El Monte Flores. D witnesses were asked to show tattoos. Officer testified about violent, illegal activities of El Monte Flores.	352.
<u>People v. Holt</u> 37 Cal. 3d 436 208 Cal. Rptr. 547 (1984)	No	No: 352; relevance.	Cross-exam of D regarding knowledge of prison gangs, and affiliation of D wits. No evidence D was in a gang and witnesses were not parties.	Relevance.
<u>People v. Munoz</u> 157 Cal. App. 3d 999 204 Cal. Rptr. 271 (1984)	No	Probably not: But even if improper, harmless here. Concurring and dissenting opinions give six reasons for inadmissibility.	Cross-exam of D and D's wits on membership in "clubs" such as "Pee Wee Locos," "Oceano Trece."	352, but defense made concessions.
<u>United States v. Abel</u> 469 U.S. 45 105 S. Ct. 465 (1984)	Yes	Yes: Membership in common organization admissible on bias where, as here, the gang (Aryan Brotherhood) has strict tenets and is tight-knit. Decided under Federal Rules of Evidence	After defense witness denied membership in prison organization, co-member testified to D's membership and tenets of the organization, including lying to help each other.	More prejudicial than probative.

Gang Evidence Purportedly Offered to Show [BIAS]	Gang-Related Offense?	Evidence Admissible?	Mode of Introduction	Objections Made?
<u>People v. Harris</u> 175 Cal. App. 3d 944, 221 Cal. Rptr. 321 (1985)	Not clear	Yes: Relevant to fears of prosecution witness resulting in bias.	Detective testified to gang membership of Ds and statement of witness regarding fear of testifying because of gang.	Unclear whether objections made at trial; incompetence of counsel raised.
<u>People v. Luparello</u> 187 Cal. App. 3d 410, 231 Cal. Rptr. 832 (1986)	No	No: Prosecutor's attempt to cast co-D as a member of violent gang irrelevant except to impermissibly show propensity for violence. Tangential gang reference by defense witness did not entitle prosecutor to introduce irrelevant, prejudicial evidence. Harmless on this record.	Cross-examination of police officer about violent activities of F-Troop gang and inferential linkage co-D with that gang.	Relevance.
<u>People v. Malone</u> 47 Cal. 3d 1, 252 Cal. Rptr. 525 (1988)	No	No, but ok here: Evidence of prison gang activity "arguably improper" to bolster credibility of prosecution witness, but issue waived here; testimony on gang activity for future dangerousness admissible, since defense placed in issue.	Penalty phase: prison guard testified to black prison gang activity against whites to bolster credibility of prosecution witness; however the incident at issue was not gang-related; psychologist testimony of adjustment to prison life through gangs and killing brought out on cross-exam of witness called by D.	No; raised on appeal as ineffective assistance of counsel claim.

Gang Evidence Purportedly Offered to Show [EVIDENCE CODE 1101(B) Motive/Identity]	Gang-Related Offense?	Evidence Admissible?	Mode of Introduction	Objections Made?
<u>People v. Sawyer</u> 256 Cal. App. 2d 66 63 Cal. Rptr. 749 (1967)	Yes	Yes and No: Hell's Angel membership had limited admissibility to show revenge motive, but additional comment on propensity for violence overstepped admissibility; under some circumstances this could be prejudicial.	Cross-examination of co-D by prosecutor eliciting that co-D was with Hell's Angels; also references by prosecutor to Angels' propensity for violence and infamous reputation.	Yes; but invited error to extent defense counsel elicited gang evidence.
<u>People v. Beyea</u> 38 Cal. App. 3d 176 113 Cal. Rptr. 254 (1974)	Yes	Yes and No: Gang membership admissible to show motive and identity and limiting instruction given. Voir dire regarding jury bias permissible. However, scope of prosecutor's argument exceeded fair comment and was improper, harmless on these facts.	Testimony that D was wearing Hell's Angel "colors" at time of the offense; also argument by prosecutor that D's actions compared to Hitler, Mussolini, the KKK, etc; also, jury was questioned about bias against Hell's Angels in voir dire.	352 on evidence of wearing colors; no objection to prosecutor's argument so waived on appeal.
<u>In re Darrell T.</u> 90 Cal. App. 3d 325 153 Cal. Rptr. 261 (1979)	Yes	Yes: No theory articulated.	Security guard testified on history of gang activity.	Apparently no objection.

Gang Evidence Purportedly Offered to Show [EVIDENCE CODE 1101(B) Motive/Identity]	Gang-Related Offense?	Evidence Admissible?	Mode of Introduction	Objections Made?
<u>People v. McDaniels</u> 107 Cal. App. 3d 898 166 Cal. Rptr. 12 (1980)	Yes	Yes: Officer considered expert, so hearsay ok; no 352 problem.	Gang expert testified that when a gang goes to rival territory, it means more than a fist fight is intended.	Unclear whether objections made at trial; D elicited gang evidence through fellow gang members and mother.
<u>People v. Perez</u> 114 Cal. App. 3d 470 170 Cal. Rptr. 619 (1981)	No	No: Gang membership not relevant to show identity; no exercise of court's 352 discretion on other gang crime; even with admonishment to limit testimony, this was prejudicial error.	Gang officers testified on common membership of D and co-D in gang to show identity. D and co-D had to show jury their gang tattoos. Also evidence of other uncharged gang crime to show identity, motive, consciousness of guilt.	Relevance, 352.
<u>People v. Szeto</u> 29 Cal. 3d 20 171 Cal. Rptr. 652 (1981)	Yes	Maybe not, but issue not resolved because of insufficient objection on expert opinion. Dissent says gang evidence was inadmissible hearsay.	Gang officer opinion on D's gang membership and history of SF gang war.	Majority finds objection insufficient.
<u>People v. Dominguez</u> 121 Cal. App. 3d 481 175 Cal. Rptr. 445 (1981)	Yes	Yes: Relevant to show motive; no 352 problem.	Uncharged accomplice and former courier for Nuestra Familia testified on duties of gang "soldiers," criminal enterprise of the group, threat of death for non-compliance.	No: objection was insufficient and untimely.

Gang Evidence Purportedly Offered to Show EVIDENCE CODE 1101(B) Motive/Identity]	Gang-Related Offense?	Evidence Admissible?	Mode of Introduction	Objections Made?
<u>People v. Martinez</u> 120 Cal. App. 3d 607 174 Cal. Rptr. 771 (1981)	No	Limited admissibility to show consciousness of guilt, but prosecutor violated spirit of court's ruling in not telling the court the testimony on threat would include gang references.	Victim testified of D's threats to have La Familia or the Mafia burn down her house if she testified.	352; Relevance.
<u>People v. Frausto</u> 121 Cal. App. 3d 129 185 Cal. Rptr. 314 (1982)	Yes	Yes: To prove motive; failure to object viewed as tactical (D could use gang membership to blame other gang members).	V testified he was in enemy turf; co-D said he "used to be" in the gang that ruled the turf where offense occurred.	No: objection "insufficient" (incompetence claim on appeal)
<u>People v. Contreras</u> 144 Cal. App. 3d 749 192 Cal. Rptr. 810 (1983)	Yes	Yes: To show motive and identity; no 352 problem seen by court, and limiting instruction given.	Gang officers testified on D's gang membership, gang nickname and leadership of the group.	Relevance; but no objection to earlier gang references in voir dire or opening statement
<u>People v. Yu</u> 143 Cal. App. 3d 358 191 Cal. Rptr. 859 (1983)	Yes	Yes: To show motive and intent; no 352 problem.	Joe Boy gang member witness testified to previous orders to kill made by D, to show leadership.	Probably, but unclear what objections made.

Gang Evidence Purportedly Offered to Show [EVIDENCE CODE 1101(B) Motive/Identity]	Gang-Related Offense?	Evidence Admissible?	Mode of Introduction	Objections Made?
<u>Williams v. Superior Court</u> 36 Cal. 3d 441 204 Cal. Rptr. 700 (1984)	Yes	No: If tried separately, evidence of the other uncharged offense would be insufficiently disincriminative to be admissible on identity. Relevance and 352 problems.	Unrelated gang offenses joined for trial.	Motion to sever.
<u>People v. Soto</u> 157 Cal. App. 3d 694 204 Cal. Rptr. 204 (1984)	No	No: Hearsay, 352, minimal relevance.	Proposed testimony by D of rumors that victim had been a gang member and gang members killed her.	D was proponent of excluded evidence.
<u>People v. Plasencia</u> 168 Cal. App. 3d 346 223 Cal. Rptr. 786 (1985)	Yes	Yes: To prove identity, bias and motive.	Prior inconsistent statements of fellow gang members regarding D's membership and presence at offense.	Apparently, the only objection was to jury instruction on gang membership.
<u>People v. Burns</u> 186 Cal. App. 3d 1440 242 Cal. Rptr. 573 (1987)	Yes	Yes: Relevant to D's consciousness of guilt, motive and intent. Gang membership integral to retaliatory action here.	Jail letter from D to co-D with references to common gang membership in relation to plans to fabricate evidence and intimidate witnesses.	Relevance; 352 not made until appeal, so waived.