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# THE CONSTITUTIONALITY OF ANTI-GANG LEGISLATION

BETH BJERREGAARD\*

## I. INTRODUCTION

Street gangs are thought by many to present a clear threat to public safety.<sup>1</sup> As Jeffery Mayer states, “gangs are routinely portrayed as an alien presence in otherwise stable communities.”<sup>2</sup> Gangs are now thought to be heavily armed with a sophisticated array of weaponry.<sup>3</sup> Urban street gangs are associated with the drug trade and an increase in homicides in many areas.<sup>4</sup> Law

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1. David A. Anderson, *Jail, Jail, The Gang's All Here: Senate Crime Bill Section 521, The Criminal Street Gang Provision*, 36 B.C. L. REV. 527, (1995); Irving A. Spergel, *The Youth Gang Problem: A Community Approach* 26 (1995); Terence R. Boga, *Turf Wars: Street Gangs, Local Governments, and the Battle for Public Space*, 29 HARV. C.R.-C.L. L. REV. 477 (1994); Joel D. Berg, *The Troubled Constitutionality of Antigang Loitering Laws*, 69 CHI-KENT L. REV. 461(1993); Patrick Jackson & Cary Rudman, *Moral Panic and the Response to Gangs in California*, in *Gangs, The Origin and Impact of Contemporary Youth Gangs in the United States 257-273* (Cummings S. & Monti D. eds., 1993); Daniel J. Monti, *Origins and Problems of Gang Research in the United States*, in *GANGS, THE ORIGINS AND IMPACT OF CONTEMPORARY YOUTH GANGS IN THE UNITED STATES 3* (Cummings S. & Monti D. eds., 1993).

2. Jeffrey J. Mayer, *Individual Moral Responsibility and the Criminalization of Youth Gangs*, 28 WAKE FOREST L. REV. 943, 945 (1993).

3. David R. Truman, Note, *The Jets and Sharks Are Dead: State Statutory Responses to Criminal Street Gangs*, 73 WASH. U.L.Q. 683, 703 (1995).

4. Malcolm W. Klein, *Street Gangs*, in *PERSPECTIVES ON CRIMINAL JUSTICE* 113-114 (Calhoun C. & Ritzer G. eds., 1996); Lisa Porche-Burke & Christopher Fulton, *The Impact of Gang Violence: Strategies for Prevention and Intervention*, in *SUBSTANCE ABUSE AND GANG VIOLENCE* 86 (Cervantes R. ed., 1992); D. Bryant, *Community wide Responses Crucial for Dealing with Youth Gangs*, *Juv. Just. Bull.* Sept. 1989, at 2-3; Malcolm W. Klein & Cheryl L. Maxson, *Street Gang Violence*, in *VIOLENT CRIME AND VIOLENT CRIMINALS* 218 (Weiner N. & Wolfgang M. eds., 1989); Del Stover, *A New Breed of Youth Gangs is on the Prowl and a Bigger Threat Than Ever*, 173 AM. SCH. BOARD J., August 1986, at 19; Jerome S. Sumphauzer, et.al., *Violence by Street Gangs: East Side Story?*, in *VIOLENT BEHAVIOR: SOCIAL LEARNING APPROACHES TO PREDICTION, MANAGEMENT, AND TREATMENT*, 68 (Stuart R. ed., 1981).

enforcement agencies and courts have been largely frustrated by attempts to control the problem through the application of traditional criminal laws.<sup>5</sup>

As a result, state legislatures have drafted new legislation aimed specifically at addressing the problem of criminal street gangs. In 1988, California became the first state to pass anti-gang legislation with the enactment of the California Street Terrorism Enforcement and Prevention Act (STEP). The act primarily makes it a crime to engage in criminal gang activity.<sup>6</sup> It establishes 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 guilty of a criminal offense.<sup>7</sup> Sentence enhancements are possible for gang members involved in criminal activity and for gang members who commit felonies on or near school grounds.<sup>8</sup> The legislation establishes a nuisance provision which targets buildings or places utilized by gang members for criminal activities, and penalizes coercing gang participation.<sup>9</sup>

Several other states quickly followed suit enacting legislation modeled after the California S.T.E.P. Act.<sup>10</sup> Some states have criminalized more specific gang activities such as recruitment and solicitation,<sup>11</sup> gang intimidation,<sup>12</sup> and gang drive-bys.<sup>13</sup> These

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5. *Id.*, at 685; James Blake Sibley, *Gang Violence: Response of the Criminal Justice System to the Growing Threat*, 11 CRIM. JUST. J. 403, 406 (1989). In particular, Sibley mentions the difficulties prosecutors encounter when trying to prosecute gang-related crimes such as witness intimidation, juvenile codes, etc.

6. CAL. PENAL CODE §§ 186.20-.28 (West Supp. 1998).

7. CAL. PENAL CODE § 186.22(a) (West Supp. 1998).

8. § 186.22(b)(2).

9. § 186.22a(a).

10. ARIZ. REV. STAT. ANN. § 13-2308 (West Supp. 1996); ARK. CODE ANN. § 5-74-102 (Michie Supp. 1995); CAL. PENAL CODE § 186.20-28 (West 1997); GA. CODE ANN. §§ 16-15-1 to -5 (1996); ILL. COMP. STAT. 147/15 (Smith-Hurd Supp. 1996); IND. CODE ANN. §§ 35-45-9-1 to -4 (Michie Supp. 1996); IOWA CODE ANN. § 723A.1-2 (West Supp. 1993); LA. REV. STAT. ANN. §§ 15:1401-1405 (West 1992); MINN. STAT. ANN. § 609.229 (West Supp. 1997); MISS. CODE ANN. § 97-44-3 (Supp. 1996); MO. ANN. STAT. §§ 578.421-430 (West 1995); NEV. REV. STAT. § 193.168(1992); N.D. CRIM. CODE 12.1-06.2-03 (Supp. 1995); S.D. CODIFIED LAWS § 22-10-14 to -15 (Michie Supp. 1996).

11. See ALASKA STAT. § 11.61.160 (Michie 1996); ARK. CODE ANN. §§ 5-74-201 to -203 (Michie Supp. 1995); CAL. PENAL CODE § 186.26 (West 1997); FLA. STAT. ANN. § 874.05 (West 1994); ILL. COMP. STAT. 5/12-6.1 (West Supp. 1996); IOWA CODE ANN. § 723A.3 (West Supp. 1996); N.D. CRIM. CODE § 12.1-06.2-03 (Supp.

statutes provided prosecutors with a wider array of tools to utilize when prosecuting gang members. In addition, they allow the courts to directly attack the problem of gang membership and not simply the “manifestation of the gang problem” or the criminal acts engaged in by gang members.<sup>14</sup>

The purpose of this article is to examine the constitutionality of anti-gang legislation within the context of the First Amendment. Specifically, the doctrines of vagueness and overbreadth and the related issue of freedom of association will be examined with respect to statutory provisions which criminalize gang participation.

## II. CONSTITUTIONAL CHALLENGES TO ANTI-GANG LAWS

### A. *The Doctrine of Vagueness*

The vagueness doctrine derives from the due process clauses of the Fifth and Fourteenth Amendments. A statute is considered to be unconstitutionally vague if persons “of common intelligence must necessarily guess at its meaning and differ as to its application.”<sup>15</sup> The purpose of this doctrine is to ensure that citizens are given fair warning as to what types of behaviors are proscribed by the statute. Furthermore, law enforcement officers are provided with clear standards of enforcement that limit discretion and avoid arbitrary and discriminatory application of the law.<sup>16</sup> The Supreme Court has concluded that unduly vague statutes can have a “chilling” effect on speech and/or freedom of association, as citizens may simply refrain from exercising their rights to free speech or association rather than risk violating a statute that they cannot interpret.<sup>17</sup> Although the Court has made it clear that the vagueness doctrine is not meant to impose impossible standards of specificity on legislatures,<sup>18</sup> statutes which hold the potential to

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1995); OKLA. STAT. ANN. tit. § 21,856 (West Supp. 1997); WIS. STAT. ANN. § 941.38 (West 1996).

12. IND. CODE ANN. § 35-45-9-4 (Michie 1994).

13. See ARK. CODE ANN. § 5-74-107 (Michie 1997).

14. Truman, *supra* note 3, at 706.

15. Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926).

16. Kolender v. Lawson, 461 U.S. 352, 357 (1983); Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939).

17. NAACP v. Button, 371 U.S. 415, 432-33 (1963).

18. United States v. Petrilla, 332 U.S. 1, 7 (1947).

infringe on constitutionally protected activity may require greater precision and are generally more closely scrutinized.<sup>19</sup>

There are several techniques that have been employed by legislatures that attempt to mitigate or preclude vagueness challenges in anti-gang legislation. One of the more common methods has been to require active participation in the gang accompanied by knowledge of the gangs' criminal behavior.<sup>20</sup> This requirement ensures that only members who are aware of the gangs' criminal activities and who actively participate in these enterprises are punished. Members who are either unaware of the gangs' criminal involvement or who are nothing more than passive members will not fall within the scope of the statute.

Another frequently utilized method of avoiding vagueness challenges is to impose a specific intent requirement.<sup>21</sup> A scienter element both limits law enforcement discretion and narrows the potential reach of the statute.<sup>22</sup> A common requirement is that the act be committed with the intent to "promote, further or assist the criminal conduct of the gang."<sup>23</sup> A third method is to narrowly define critical terms in the statutes. Legislatures have taken

19. Berg, *supra* note 1, at 470.

20. See CAL. PENAL CODE §§ 186.20-28 (West 1997); GA. CODE ANN. §§ 16-15-1 to -5 (1996); IND. CODE ANN. §§ 35-45-9-1 to (Michie Supp. 1996); IOWA CODE ANN. § 723A.1-2 (West Supp. 1993); MO. ANN. STAT. §§ 578.421-430 (West 1995); NEV. REV. STAT. § 193.168 (Michie 1992). For example, the California statute that most are modeled after requires that the individual "actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal activity . . ." (CAL. PENAL CODE § 186.22(a) (West 1997)).

21. ARIZ. REV. STAT. ANN. § 13-2308 (West Supp. 1996); CAL. PENAL CODE §§ 186.20-28 (West 1997); GA. CODE ANN. §§ 16-15-1 to -5 (1996); ILL. COMP. STAT. § 147/15 (West Supp. 1996); IND. CODE ANN. §§ 35-45-9-1 to -4 (Michie Supp. 1996); IOWA CODE ANN. § 723A.1-2 (West Supp. 1993); LA. REV. STAT. ANN. §§ 15:1401-1405 (West 1992); MINN. STAT. ANN. § 609.229 (West Supp. 1997); MISS. CODE ANN. § 97-44-3 (Supp. 1996); MO. ANN. STAT. §§ 578.421-430 (West 1995); NEV. REV. STAT. § 193.168 (1992); N.D. CRIM. CODE § 12.1-06.2-03 (Supp. 1995); S.D. CODIFIED LAWS § 22-10-14 to -15 (Michie Supp. 1996).

22. Berg, *supra* note 1, at 472. *Hoffman Estates v. Flipside, Hoffman Estates Inc.*, 455 U.S. 489, 499 (1982).

23. See ARIZ. REV. STAT. ANN. § 13-2308 (West Supp. 1996) (Intent to promote or further criminal objectives of syndicate); CAL. PENAL CODE §§ 186.20-28 (West 1997); GA. CODE ANN. §§ 16-15-1 to -5 (1996); MINN. STAT. ANN. § 609.229 (West Supp. 1997); MO. ANN. STAT. §§ 578.421-430 (West 1995); NEV. REV. STAT. § 193.168 (1992); N.D. CRIM. CODE § 12.1-06.2-03 (Supp. 1995).

great pains to carefully construct anti-gang statutes.<sup>24</sup> All the statutes examined herein expressly define the term “criminal street gang.”<sup>25</sup> Similarly, several of the statutes define what is meant by the term “gang member”<sup>26</sup> and a “pattern of criminal activity.”<sup>27</sup>

### B. *The Doctrine of Overbreadth*

The overbreadth doctrine is also related to First Amendment freedoms. A statute is considered to be overbroad if in addition to the undesirable behavior, it includes constitutionally protected activities, especially those related to free expression or free association.<sup>28</sup> As with vague laws, statutes that are overbroad may deter citizens from practicing their First Amendment rights and

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24. Although the court has held that any undefined terminology should be understood according to “common meanings or through reference to legislative history or judicial interpretations of the provisions” Silviya A. Strikis, Note, *Stopping Stalking*, 81 GEO. L.J., 2771, 2791 (1993).

25. Although there are varying definitions employed most are similar to California’s definition which designates “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, having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.” CAL. PENAL CODE § 186.22(f) (West 1997).

26. A gang member is typically defined as “a person who engages in a pattern of criminal street gang activity and who meets two or more of a list of enumerated criteria” most often including self-admission, identification by a parent/guardian, information from a reliable informant or an informant plus corroboration, physical evidence, photographs, tattoos, clothing style, colors, residing in an area frequented by gang members, use of hand signs, and being stopped in the company of or arrested with gang members a number of times. Ariz. Rev. Stat. Ann. § 13-105(8) (West Supp. 1996). See also FLA. STAT. ANN. § 874.03(2) (West 1994); 740 ILL. COMP. STAT. 147/10 (West Supp. 1996); MISS. CODE ANN. § 97-44-3(c) (Supp. 1996); S.D. CODIFIED LAWS ANN. § 22-10-14(2) (Supp. 1996).

27. A pattern of criminal activity is typically defined as “the commission of, attempted commission of, or solicitation of, or sustained juvenile petition for, or conviction of two or more of the following offenses, proving at least one of these offenses occurred after the effective date of this chapter and the last of those offenses occurred within three years after the prior offense and the offenses were committed on separate occasions or by two or more persons.” CAL. PENAL CODE § 186.22(e) (West 1997). See also FLA. STAT. ANN. 874.03(3) (West 1994); GA. CODE ANN. § 16-15-3(3) (1996); IOWA CODE ANN. § 723A.1.3 (West Supp. 1993); La. Rev. Stat. Ann. § 15:1404(B) (West 1992); Mo. Ann. Stat. § 578.421 (2) (West 1995); S.D. Codified Laws Ann. § 22-10-14(3) (Michie Supp. 1996).

28. *Thornhill v. Alabama*, 310 U.S. 88, 97-98 (1940).

may grant law enforcement officials too much discretion, leading to arbitrary or discriminatory enforcement.<sup>29</sup> In First Amendment cases, where legislation is aimed at proscribing conduct and not pure speech, the Supreme Court has held that the overbreadth must not only be real, but must also be substantial when compared to lawful applications before a statute will be struck down as unconstitutional.<sup>30</sup> Since anti-gang legislation criminalizes activities which promote or assist a criminal street gang, challenges alleging overbreadth will be held to this heightened level of scrutiny.

The doctrine of overbreadth is unique in that it also holds procedural implications. Contrary to the usual rules of standing, defendants challenging a statute as overly broad may not only challenge the statute as it applies to their own conduct, but may also claim that the statute violates the First Amendment rights of others.<sup>31</sup>

The argument set forth is that anti-gang laws are overbroad because they infringe on citizens' First Amendment freedoms of association.<sup>32</sup> Traditionally, the Supreme Court "has confined freedom of association protection to groups engaged in some form of First Amendment activity" such as speech, assembly, religious worship, political advocacy, etc.<sup>33</sup> The Court has recognized a right of citizens to enter into and maintain certain intimate relationships free from undue intrusion by the state. However, this right has generally been limited to the context of family relations.<sup>34</sup> The Court has stated that the right to associate extends to associations which "pertain to the social, legal, and economic benefit of the members."<sup>35</sup> Although it could be argued that this

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29. *Scott v. District Attorney*, 309 F.Supp. 833, 838 (E.D. La. 1970). *See also*, *Arnett v. Kennedy*, 416 U.S. 134, 150 (1974) (Marshall J., dissenting) (an overbroad statute "hangs over their heads like a Sword of Damocles. . . the value of a sword of Damocles is that it hangs - not that it drops.").

30. *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

31. *Id.* at 611.

32. Susan L. Burrell, *Gang Evidence: Issues For Criminal Defense*, 30 SANTA CLARA L. REV. 739, 776 (1990); Alexander A. Molina, Comment, *California's Anti-Gang Street Terrorism Enforcement And Prevention Act: One Step Forward, Two Steps Back?*, 22 SW. U. L. REV. 457, 462-469 (1993). *See also* Berg, *supra* note 1, at 488 (this argument has also been made with respect to anti-gang loitering laws).

33. *Roberts v. United States Jaycees* 468 U.S. 609, 617-618 (1984). Boga, *supra* note 1, at 495.

34. *Roberts*, 468 U.S. at 620, Anderson, *supra* note 1, at 530.

35. *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965).

latter application may apply to gang-like associations,<sup>36</sup> the Supreme Court has rejected similar claims in the past holding that groups like the Jaycees did not qualify as intimate associations.<sup>37</sup>

The Court has failed to recognize a general right to "social association."<sup>38</sup> However, the Court has declared that mere membership in an association cannot be criminalized.<sup>39</sup> In fact, some have argued that the First Amendment protects "the right to associate with others even if they are engaged in criminal activity."<sup>40</sup> Although this may seemingly apply to the gang situation, it is important to note that First Amendment rights to associate are not absolute. Some argue that the gang's criminal conduct "dissolves any associational rights."<sup>41</sup> In fact the Supreme Court in *United States v. Choate* stated that "the practice of associating with compatriots in crime is not a protected associational right."<sup>42</sup> Thus it appears that the Supreme Court will be reluctant to recognize gang membership as an activity protected by the First Amendment freedom of association.

Claims regarding freedom of association are examined under the doctrine of strict scrutiny, meaning that the statutes must further a compelling governmental interest and must employ the least restrictive means of accomplishing that objective.<sup>43</sup> In an attempt to preclude overbreadth challenges, several states have written compelling interests into the preambles of their statutes. For example, California legislation asserts that:

The State of California is in a state of crisis which has been caused by violent street gangs whose members threaten, terrorize and commit a multitude of crimes against the peaceful citizens of their neighborhood. These activities, both individually and collectively,

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36. Molina, *supra* note 33, at 462-466.

37. Roberts, 468 U.S. at 619-620. *See also*, *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989). *But cf.* *Bates v. City of Little Rock*, 361 U.S. 516, 522-523 (1960) (Holding groups that engage in some form of protected first amendment activity can receive protection.).

38. *Stanglin*, 490 U.S. at 25.

39. Holland, *supra* note 40, at 295; *People v. Rodriguez*, 26 Cal. Rptr.2d 660,664 (1993); Burrell, *supra* note 33, at 777; Molina, *supra* note 33, at 465.

40. Truman, *supra* note 3, at 716.

41. Lisa Rein, Note, *Washington State Exceptional Sentences For Gang Members: An Analysis of State v. Johnson*, 30 GONZ. L. REV. 411, 422 (1994/95).

42. *United States v. Choate*, 576 F.2d 165, 181 (9th Cir. 1978).

43. *NAACP v. Alabama*, 357 U.S. 449, 463 (1958).



present a clear and present danger to public order and safety and are not constitutionally protected.<sup>44</sup>

Similarly the Colorado statute maintains that “the proliferation of gangs and gang-related crimes. . .has become a matter of statewide concern.”<sup>45</sup> The Arkansas law states that it is “experiencing an increase in crime committed by criminal gangs. . .” and that “criminal gangs, organizations, and enterprises control their market areas by terrorizing the peaceful citizens in their neighborhood with deliberate and random acts of violence.”<sup>46</sup> Legislation in Arkansas, California and Florida all contend that “it is the right of every person. . .to be secure and protected from fear, intimidation and physical harm caused by the activities of violent groups and individuals.”<sup>47</sup> These laws state up front that the states have a compelling interest in preventing criminal street gang activity.<sup>48</sup>

In addition to examining statutes for a compelling state interest, courts evaluating overbreadth claims will also “analyze the statute in light of any limiting constructions that the statutes employ.”<sup>49</sup> One common method utilized by states to mitigate challenges of overbreadth is to explicitly exclude constitutionally protected activity from the scope of the statute. For example, anti-gang legislation for the states of Arkansas, California, Florida, Georgia, Illinois and Louisiana proclaim that their General Assemblies recognize “the right of every citizen to harbor and constitutionally express beliefs on any lawful subjects whatsoever, to associate lawfully with others who share similar beliefs, to petition lawfully constituted authority for redress of perceived grievances and to participate in the electoral process”, and that “it is not the intent of this subchapter to interfere with the constitu-

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44. CAL. PENAL CODE § 186.21 (West 1997). *See also*, FLA. STAT. ANN. § 874.02(2) (West Supp. 1997); GA. CODE ANN. § 16-15-2(b) (1996); 740 ILL. COMP. STAT. 147/5(d) (West Supp. 1996); LA. REV. STAT. ANN. § 1402(B) (West 1992). Florida, Georgia, Illinois and Louisiana all state that they are in a “state of crisis which has been caused by violent street gangs” and that these gangs are presenting a clear and present danger to the community. *Id.*

45. COL. REV. STAT. § 24-33.5-415.3 (West 1996).

46. ARK. CODE ANN § 5-74-102 (Michie Supp. 1995).

47. Ark. Code Ann. 5-74-102(a) (Michie Supp. 1995); CAL. PENAL CODE 186.21 (West 1997); FLA. STAT. ANN. § 874.02 (1) (West Supp. 1997).

48. *Id.*

49. *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973).

tional exercise of the protected rights and freedoms of expression and association."<sup>50</sup>

Thus, in many instances, legislatures attempt to address overbreadth *a priori* by explicitly indicating a compelling state interest and maintaining that the statutes do not infringe upon constitutionally protected rights. It should be noted that the methods utilized by legislatures to avoid vagueness challenges also help to mitigate overbreadth challenges. Requiring active participation along with knowledge of the group's criminal activities and imposing a specific intent requirement narrows the potential reach of the statute.

### III. THE JUDICIAL RESPONSE: ANALYSIS OF APPELLATE COURT DECISIONS

Eleven appellate court decisions handed down between 1991 and 1998 are analyzed in the accompanying tables. Table 1 presents a summary of the opinions and holdings in each of these cases. The cases are arranged chronologically with the most recent cases presented last. The table indicates the type of challenge presented (vagueness/overbreadth) and the court ruling with regard to that issue. In addition, if the appellant proffered a vagueness challenge the exact terminology that was challenged is delineated. If the appellant challenged the statute as overbroad, the table indicates whether or not the court held that the statute implicated the constitutional right to freedom of association, and whether or not the court recognized a compelling state interest that was served by the anti-gang statutes. The last several columns of the table denote whether the court recognized any of the limiting elements employed by legislatures as important in assessing both vagueness and/or overbreadth challenges.

#### A. Vagueness Challenges

Thus far, eleven cases have challenged anti-gang legislation as void for vagueness.<sup>51</sup> Eight of those cases challenged state leg-

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50. ARK. CODE ANN. § 5-74-102(a) (Michie Supp. 1995); CAL. PENAL CODE § 186.21 (West Supp. 1997); FLA. STAT. ANN. § 874.02(1) (West Supp. 1997); GA. CODE ANN. § 16-15-2(a) (1996); 740 ILL. COMP. STAT. 147/5(a) (West Supp. 1996); LA. REV. STAT. ANN. 1402(A) (West 1992).

51. See *State v. Baldenegro*, 932 P.2d 275 (Ariz. App. 1996); *State v. McCoy*, 928 P.2d 647 (1996), *cert. denied*, 117 S.Ct. 1018 (1997); *In re Alberto R.*, 1 Cal. Rptr. 2d 348 (1991); *People v. Gamez*, 286 Cal. Rptr. 894 (1991); *People v. Green*, 278 Cal. Rptr. 140 (1991); *City of Harvard v. Gaut*, 660 N.E.2d 259 (Ill. App.

Case	Vague broad	Over-broad	Challenged Terminology	Implicates Constitutional Rights-Freedom of Association			Court Recognized Limiting Elements			Key Excludes Constitutional Activity Terms Defined
				Compelling State Interest	Specific Intent	Active Participation Required	Knowledge of Group Activities Required	Excludes Constitutional Activity		
People v. Green, 278 Cal. Rptr. 140 (1991)	No	No	Actively Participates; Membership; Criminal Street Gang; Knowledge of Pattern of Criminal Gang Activity; Willfully Promotes, Furthers or Assists in any Felonious Criminal Conduct							
People v. Gamez, 286 Cal. Rptr. 894 (1991)	No	No	Criminal Street Gang; Actively Participates; Membership	Yes	X			X		X
In re Alberto, 1 Cal. Rptr. 2d 348 (1991)	No	No	To Promote, Further and Assist; Felonious Criminal Conduct; Benefit of; Primary Activities							
State v. Walker, 506 N.W.2d 430 (Iowa 1993)	No	No	Participates or is a Member of a Criminal Street Gang; Willfully Aids and Abets any Criminal Act for the Benefit of, at the Direction of, or in Association with any Criminal Street Gang			X				X
Helton v. State, 624 N.E.2d 499 (Ind. App. 1993)	No	No	Not Articulated	No		X		X		
Jackson v. State, 634 N.E.2d 532 (1994)	No	No	Promotes, Sponsors, Assists and Participates;	No		X		X		
City of Chicago v. Youkhana, 660 N.E.2d 34 (Ill. App. 1995)	Yes	Yes	Entire Statute	Yes						
City of Harvard v. Gaut, 660 N.E.2d 259 (Ill. App. 1996)	Yes	Yes	Entire Statute—Gang Symbols; Gang Colors, Gang					X		
State v. McCoy, 928 P.2d 647 (Cal. 1996)	No	No				X				
State v. Baldenegro, 932 P.2d 275 (Ariz. App. 1996)	No	No	Lacks Standing to Challenge			X		X		X
Klein v. Indiana, 698 N.E.2d 296 (1998)	No	No	Criminal Gang	No				X		

islation<sup>52</sup> and two challenged city ordinances.<sup>53</sup> Only the two cases challenging city ordinances were held to have merit by the courts. In both cases the courts struck down the entire statute as being both vague and overbroad.<sup>54</sup> None of the vagueness challenges to state legislation were sustained. State appellants challenged a variety of terms including “actively participates”,<sup>55</sup> “criminal street gang”,<sup>56</sup> “knowledge of pattern of criminal gang activity”,<sup>57</sup> “willfully promotes, furthers or assists in any felonious criminal conduct”,<sup>58</sup> and membership.<sup>59</sup> The various courts held that each of these terms was specific enough to withstand constitutional challenge. Therefore, it appears that states have avoided vagueness challenges by specifically defining key terminology within the context of the statute.

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1996); *City of Chicago v. Youkhana*, 660 N.E.2d 34 (Ill. App. 1995); *Klein v. State*, 698 N.E.2d 296 (Ind. 1998); *Jackson v. State*, 634 N.E.2d 532 (Ind. App. 1994); *Helton v. State*, 624 N.E.2d 499 (Ind. App. 1993), *cert. denied*, 117 S.Ct. 1252 (1997); *State v. Walker*, 506 N.W.2d 430 (Iowa 1993).

52. See, *Baldenegro*, 932 P.2d at 275; *McCoy*, 928 P.2d at 647; *Alberto*, 1 Cal. Rptr. 2d at 348; *Gamez*, 286 Cal. Rptr. at 894; *Green*, 278 Cal. Rptr. at 140; *Walker*, 506 N.W.2d at 430; *Jackson*, 634 N.E.2d at 532; *Helton*, 624 N.E.2d at 499.

53. See *Gaut*, 660 N.E.2d at 259; *Youkhana*, 660 N.E.2d at 34.

54. The City of Harvard made it unlawful for “any person within the City to wear known gang colors, emblems, or other insignia, or appear to be engaged in communicating gang-related messages through the use of hand signals or other means of communication” *Gaut*, 660 N.E.2d at 259, 260. The Chicago ordinance provides that “whenever a police officer observes a person whom he reasonably believes to be a criminal street gang member loitering in any public place with one or more other persons, he shall order all persons to disperse and remove themselves from the area. Any person who does not promptly obey such an order is in violation of this section” *Youkhana*, 660 N.E.2d at 34, 36. It is obvious that neither jurisdiction employed any of the limiting elements utilized by state legislatures.

55. *Green*, 278 Cal. Rptr. 145.

56. *Gamez*, 286 Cal. Rptr. at 901; *Green*, 278 Cal. Rptr. at 146.

57. *Id.* at 147.

58. *Alberto*, 1 Cal. Rptr. 2d at 348, 356; *Green*, 278 Cal. Rptr. at 148; *Walker*, 506 N.W.2d at 432 (“willfully aids and abets any criminal act committed for the benefit of, at the direction of, or in association with any criminal street gang.”).

59. *Gamez*, 286 Cal. Rptr. at 902; *Green*, 278 Cal. Rptr. at 145-146.

## B. Overbreadth Challenges

Seven appellate cases have challenged state statutes as overbroad<sup>60</sup> and two cases have challenged city ordinances.<sup>61</sup> Again, the two challenged city ordinances were struck in their entirety, not only for vagueness, but also for violating the overbreadth doctrine. However, none of the challenges to the state statutes were supported by the courts. Significantly, the courts failed to recognize that these statutes infringed on citizens' freedoms of association.<sup>62</sup> Importantly, most of the courts have recognized the importance of the limiting techniques employed by legislatures. The most frequently mentioned techniques were the requirements of active participation with knowledge<sup>63</sup> and specific intent.<sup>64</sup> Likewise, the courts acknowledged the importance of declaring a compelling state interest,<sup>65</sup> excluding constitutionally protected activities,<sup>66</sup> and defining key terminology.<sup>67</sup>

Interestingly, the majority of the time, the courts refused to examine the facial validity of the statutes, citing either the fact that these statutes required the state to show "aiding and abetting in an actual criminal act" not mere association<sup>68</sup> or that in it was clear that the defendants' conduct fell within the range of conduct proscribed by the statute and therefore he/she could only challenge the statute as it applied to him or her specifically.<sup>69</sup> The state of Indiana essentially refused to consider this issue stating that "an overbreadth analysis under the U.S. Constitution is not applicable to the Indiana Constitution."<sup>70</sup> Therefore, once the Indiana court determines that the statute is capable of constitu-

60. *Baldenegro*, 932 P.2d at 275; *McCoy*, 928 P.2d at 647; *Alberto*, 1 Cal. Rptr. 2d at 348; *Gamez*, 286 Cal. Rptr. at 894; *Walker*, 506 N.W.2d at 430; *Jackson*, 634 N.E.2d at 532; *Helton*, 624 N.E.2d at 499.

61. *Gaut*, 660 N.E.2d at 259; *Youkhana*, 660 N.E.2d at 34.

62. *Jackson*, 634 N.E.2d at 536; *Helton*, 624 N.E.2d at 508-509.

63. *McCoy*, 928 P.2d at 650; *Walker*, 506 N.W.2d at 432; *Jackson*, 634 N.E.2d 536; *Helton*, 624 N.E.2d at 511.

64. *Baldenegro*, 932 P.2d at 275; *McCoy*, 928 P.2d at 647; *Alberto*, 1 Cal.Rptr.2d at 348; *Klein*, 698 N.E.2d at 296; *Jackson*, 634 N.E.2d at 532; *Helton*, 624 N.E.2d at 499.

65. *Alberto*, 1 Cal.Rptr.2d at 348.

66. *Id.*

67. *Id.*; *Baldenegro*, 932 P.2d at 275; *Walker*, 506 N.W.2d at 430.

68. See *Baldenegro*, 932 P.2d at 275; *McCoy*, 928 P.2d at 647; *Alberto*, 1 Cal.Rptr.2d at 357; *Walker*, 506 N.W.2d at 433.

69. *Baldenegro*, 932 P.2d at 279.

70. *Jackson*, 634 N.E.2d at 532, 536.

tional application, it then focuses on whether or not the statute was constitutionally applied in the case under review.<sup>71</sup> In both appellate cases examined by the Court of Appeals of Indiana, the court held that the anti-gang legislation was capable of constitutional application and that the statute applied only to activities that were not protected by the First Amendment.<sup>72</sup>

#### IV. UNIQUE DIFFICULTIES OF ANTI-GANG LEGISLATION

One commentator insightfully recognized that “for a statute to have a reasonable expectation of achieving its intended goal, those crafting it must have knowledge of the behavior they are attempting to alter.”<sup>73</sup> There are several areas related to gang membership and gang activity in which it appears that legislatures have not fully explored what it means to criminalize these behaviors.

Social science researchers have been plagued by definitional issues since they began formally studying gangs in the 1920s. In fact, researchers have yet to agree on a single definition for this complex phenomenon.<sup>74</sup> To further complicate matters, law

71. *Id.* at 536.

72. *Id.* at 563; *Helton*, 624 N.E.2d at 507.

73. Holland, *supra* note 40, at 278.

74. One of the earliest definitions of a gang was developed by FREDERICK THRASHER, *THE GANG*, 46 (1963), who defined a gang as an “interstitial group, originally formed spontaneously, and then integrated through conflict. It is characterized by the following types of behaviors: meeting face to face, milling, movement through space as a unit, conflict, and planning. The result of this collective behavior is the development of tradition, unreflective internal structure, esprit de corps, solidarity, morale, group awareness, and attachment to a local territory. *Id.* Subsequently, MALCOLM W. KLEIN, *STREET GANGS AND STREET WORKERS* 13 (1971) specified a gang as “any denotable adolescent group of youngsters who (a) are generally perceived as a distinct aggregation by others in their neighborhood, (b) recognize themselves as a denotable group (almost invariably with a group name) and (c) have been involved in a sufficient number of delinquent incidents to call forth a consistent negative response from neighborhood residents and/or enforcement agencies. *Id.* WALTER B. MILLER, *VIOLENCE BY YOUTH GANGS AND YOUTH GROUPS AS A CRIME PROBLEM IN MAJOR AMERICAN CITIES* 9 (1975), concluded that “a gang is a group of recurrently associating individuals with identifiable leadership and internal organization, identifying with or claiming control over territory in the community, and engaging either individually or collectively in violent or other forms of illegal behavior”. *Id.* More recently, William B. Sanders, *Gangbans and Drive-bys: Grounded Culture and Juvenile Gang Violence*, in *SOCIAL PROBLEMS AND SOCIAL ISSUES* 20 (Best J. ed. 1994), stated that “A youth gang is any transpersonal group of youths that shows a willingness to use deadly violence to claim and

enforcement professionals and sociologists often employ vastly different definitions of gangs and gang activity.<sup>75</sup> Researchers have suggested that if these definitions vary, estimates of gang-related violence will also vary.<sup>76</sup> Since legislative wording assumes that one can only be punished if he/she is a member of a gang, it is critical to reach a consensus on the definition of a gang.

Defining gang membership presents a similar problem. "Under Florida and South Dakota laws, a person could potentially meet the statutory definition of a gang member simply by living in a gang area, associating with known gang members, and being stopped in the company of gang members more than four times."<sup>77</sup> Such legislation could benefit from the expertise of gang researchers who recognize that there are varying levels of participation in gangs and that membership in some types of gangs is ambiguous.<sup>78</sup> Researchers have discovered that gang membership is a relatively unstable phenomenon with persons often drifting in and out of gang involvement.<sup>79</sup> Malcolm Klein proposes that there are

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defend territory, and attack rival gangs, extort or rob money, or engage in other criminal behavior as an activity associated with its group, and is recognized by itself and its immediate community as a distinct dangerous entity. The basic structure of gangs is one of age and gender differentiation, and leadership is informal and multiple". *Id.* While the Chicago Crime Commission, utilized the following definition: "A street gang is a cohesive group, most members being between the ages of eleven and twenty-three years, who have recognizable geographical territory (usually defined with graffiti), leadership, a purpose, and various levels of an organized, continuous course of criminal activities." CHICAGO CRIME COMMISSION, GANGS: PUBLIC ENEMY NUMBER ONE 75 YEARS OF FIGHTING CRIME IN CHICAGOLAND 5 (1995)

75. See Richard A. Ball & G. D. Curry, *The Logic of Definition in Criminology: Purposes and Methods for Defining "Gangs"*, 33 CRIMINOLOGY 225-245 (1995); Jeffrey J. Mayer, *Individual Moral Responsibility and the Criminalization of Youth Gangs*, 28 WAKE FOREST L. REV. 943, 951-954, 956-958, 965-974 (1993); Burrell, *supra* note 33, at 746-751; Cheryl L. Maxson and Malcolm W. Klein, *Street Gang Violence: Twice as Great, or Half as Great?*, in GANGS IN AMERICA 71-102 (Huff C. ed., 1st ed. 1990).

76. Cheryl L. Maxson & Malcolm W. Klein, *Defining Gang Homicide: An Updated Look at Member and Motive Approaches*, in GANGS IN AMERICA 3, 9 (Huff C. ed., 2d ed. 1996).

77. Truman, *supra* note 3, at 717.

78. Herbert C. Covey, et.al., *Juvenile Gangs*, 12 (1992).

79. Finn-Aage Esbensen and David Huizinga, *Gangs, Drugs, and Delinquency in a Survey of Urban Youth*, 31 CRIMINOLOGY, 565, 570, 575 (1993); Terence P. Thornberry, et.al., *The Role of Juvenile Gangs in Facilitating Delinquent Behavior*, 30 J. OF RES. IN CRIME AND DELINQ., 55, 65-66, 82 (1993). Other researchers have also found that gang membership was a transient phenomenon, and that many gangs were loosely organized (Covey, *supra* note 79, at 12; Daniel

several different types of gang members including; core members, associates, peripheral or fringe members, and wannabes or recruits whose commitment and participation in the group varies.<sup>80</sup> Anti-gang legislation has the potential to punish defendants twice for the same act; once for the act itself and once for committing the act for the benefit of the gang. Thus, legislatures must be careful to proscribe only delinquent behaviors of gang members who are committed, active participants in the gang. Statutory definitions should be careful not to encompass “fringe members” or “wannabes” for example, and avoid imposing the law on those who are not full participants in the gang.

One last area of difficulty for prosecution of defendants under anti-gang legislation is demonstrating a pattern of gang activity. As noted previously, most statutes require the defendant to participate in “two or more of the enumerated offenses, providing at least one of these offenses occurred after the effective date of this chapter and the last of those offenses occurred within three years after a prior offense and the offenses were committed on separate occasions or by two or more persons.”<sup>81</sup> Logically, one would assume that the term “pattern” means that the defendant had a practice of committing delinquent acts, or at the very least, had done so on at least two occasions. However, courts have concluded that a “pattern of criminal activity” can be established by demonstrating that the defendant was involved in two or more incidents or by demonstrating that multiple offenders committed one or more offenses in a single incident.<sup>82</sup> If the defendant commits an act with other gang members that can be classified as two separate criminal offenses, then this defendant will have demonstrated a pattern of gang activity in keeping with the statute’s definition. For example, if two gang members break into a home and steal a television (breaking and entering, burglary, larceny),

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J. Monti, *Origins and Problems of Gang Research in the United States*, in *GANGS* 9-10 (Cumplings S.& Monti D. eds. 1993).

80. Malcolm W. Klein, *The American Street Gang: Its Nature, Prevalence, and Control* 59 (1995); *See also* Irving Spergel, *Youth Gangs: Continuity and Change*, in *CRIME AND DELINQUENCY: AN ANNUAL REVIEW OF THE RESEARCH* 199-201, 205 (Morris N. ed. Vol. 12 1990); J.M. HAGEDORN, *PEOPLE AND FOLKS* 90 (1989).

81. *See supra* note 28.

82. The following cases examined the sufficiency of the evidence supporting the charge and establishing a pattern of criminal activity. In *re* Nathaniel C., 279 Cal.Rptr. 236 (Cal. Ct. App. 1991); In *re* Lincoln J., 272 Cal.Rptr. 852 (Cal. Ct. App. 1990); In *re* Leland D., 272 Cal.Rptr. 709 (Cal. Ct. App. 1990).



they will each be judged to have demonstrated a pattern of "criminal activity." Allowing this element of the offense to be established by concurrent activities appears to violate the spirit of the law which is seemingly designed to punish defendants who evidence their dangerousness through repeated violations of the law.

Further, even if prosecutors establish a pattern of gang activity by demonstrating two separate criminal actions by the defendant, the Supreme Court of California has held that both offenses do not have to be "gang related."<sup>83</sup> Essentially, this means that in California a juvenile who has sustained a previous juvenile petition prior to gang involvement will be eligible for prosecution under the S.T.E.P. once it is demonstrated that he/she has committed one of the enumerated crimes, regardless of whether this individual acted alone or in the company of other gang members. Again, it is difficult to assert that one illegal act committed without accompaniment establishes a pattern of criminal activity.

#### CONCLUSION

Overall, it appears that appellate courts will uphold the constitutionality of anti-gang legislation. Courts have recognized the relevance of employing limiting elements such as specific intent and requiring knowledgeable active participation in the construction of the statutes. It is also important to clearly define key terminology within the statutes. Likewise, it is important that legislation delineates compelling state interests and an intent not to infringe upon constitutionally protected freedoms.

Nonetheless, legislatures should continue to strive to create a workable definition of both "criminal street gang" and "gang member" as well as "gang-related crime." This is critical to ensuring that a citizen's substantive due process rights are protected and that their procedural rights are preserved. Ambiguous definitions that fail to incorporate sociological interpretations of the gang phenomenon introduce the potential that juveniles who lack commitment to the gang and/or who are not active members will be inappropriately caught within the scope of the statute. Since research has shown that repeated law enforcement interventions may in fact hold criminogenic effects for potential gang members,<sup>84</sup> efforts should ensure that the law targets appropriately.

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83. *People v. Gardeley*, 927 P.2d 713,716 (Cal. 1996).

84. Felix Padilla, *Becoming a Gang Member*, in *IN THEIR OWN WORDS: CRIMINALS ON CRIME* 130-147 (Cromwell P. ed., 1986).

Likewise, legislatures need to consider their definitions of “pattern of gang activity” and perhaps modify these definitions to reflect behaviors that clearly demonstrate repeated activities, and thus truly establish a pattern.

Further, it is doubtful that the use of an anti-gang statute always represents the least restrictive alternative. Although not yet challenged, it appears that unlawful activities covered by the statutes could also be addressed by traditional criminal laws such as aiding and abetting in a criminal offense, conspiracy, solicitation, loitering, etc. Prosecutors should be careful to ensure that they are using the least restrictive and appropriate means to handle these cases.

Lastly, legislatures should work in concert with social science researchers to incorporate current knowledge regarding street gangs into the legislative schemes designed to eliminate or control them. In this way, one may ensure that citizens are protected from illegal gang activity while at the same time safeguarding the rights of defendants.